No. 02-1603

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Institution at Waymart; COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

ALBERT J. FLORA, JR.
(*Counsel of Record*)
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592
Counsel for Respondent

SCOTT C. GARTLEY
(*Counsel of Record*)
Assistant District Attorney
DAVID W. LUPAS
District Attorney
LUZERNE COUNTY DISTRICT ATTORNEY'S OFFICE
200 North River Street
Wilkes-Barre, PA 18711
(570) 825-1692
Counsel for Petitioners

[Additional Counsel Listed On Inside Cover]

Petition For Certiorari Filed April 14, 2003
Certiorari Granted September 30, 2003

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

WILLIAM RUZZO
590 Rutter Avenue
Kingston, PA 18704
Counsel for Respondent

THOMAS W. DOLGENOS
Chief, Federal Litigation
RONALD EISENBERG
Deputy District Attorney
ARNOLD H. GORDON
First Assistant District Attorney
LYNNE ABRAHAM
District Attorney

PHILADELPHIA DISTRICT ATTORNEY'S OFFICE
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700
Counsel for Petitioners

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RELEVANT DOCKET ENTRIES
Luzerne County
Court of Common Pleas

* * *

6-6-83 Upon trial before the Court with a jury, def. pleads not guilty. Whereupon, Court orders issue joined, Jury called and came as follows: #1 Marie Parise – #2 Nancy Kramer Young – #3 Wm. Kaib – #4 Robt. Fleming, Jr. #5 Susan Hoffman – #6 Joseph Fuchs – #7 Thomas Boory – #8 Beatrice Colling – #9 Sheila Steele – #10 Thomas Witherel – #11 Renee Nelson – #12 Mary Nemrig Alternates – Stephanie Brown – Kenneth Dorsey – Mary Broadus – Ralph Koch – Rosie Mitchell – Michael Copeland. Note – Juror #10 excused for medical reasons & replaced by Alternate #1 Stephanie Brown.

6-21-83 After hearing, jury finds def. guilty of all charges as follows: 1519 – 1519A – 1519B – 1519C – 1519D – 1519E – 1519F – 1519G –1506 – 1507 – 1508 – 1290 – Guilty of 1st degree murder, 1520 – Guilty 3rd degree murder. 1519H – Guilty to Attempted Murder-Agg. Assault – Recklessly Endangering. 1524 Guilty to Robbery & Intentionally Putting In Fear of Immediate Serious Bodily Injury – Robbery by Physically Taking or Removing Property by Force – Theft of Motor Vehicle – Recklessly Endangering.

6-22-83 After deliberation, Jury unanimously sentence defendant to death on all 1st degree murder charges. Def. advised of his right to file motions for new trial and/or arrest of judgment w/i 10 days, Def. remanded to Luzerne County Prison. Toole, J.

7-1-83 Motion for New Trial and or In Arrest of Judgment & Order filed. Toole, J.

* * *

11-22-85 Court sentences def. as follows – 1290 – 1st Degree murder = 1506-1519-1507-1508-1519A-1519B-1519C-1519D-1519E-1519F-1519G-2st degree murder def. is to be put to Death in a manner provided by law. Def. advised of his right to appeal to Supreme Court. On 1520=3rd degree murder serve min. 10 yrs. & max. 20 yrs. to run consecutive to death sentence. On 1519H 1st ct. Att. murder-servs min. 5 yrs. & max. 10 yrs. to run consecutive to 1520/82. On 1519H-2nd ct. Agg. Assault & 3rd ct. Recklessly Endg. merg for sentencing with 1st count. On 1524-1st ct Robbery – serve min. 10 yr. and max. 20 yrs. to run consecutive to 1st ct 1519H/82. On 1524 – 2nd ct Robbery – 3rd ct Theft – 4th ct Recklessly Endg. merge for sentencing with the 1st count. On 1519H-1520-1524/82 def. advised of right to appeal in 30 days. Right to modify 10 days. Def. remanded until sentence is executed

* * *

12-13-85 Notice of Appeal to Supreme Court on #1519H-1520-1524/82.

* * *

2/10/87 (Returned from Supreme Court). Judgement from Sentence Affirmed. (2/13/87) Includes Case Nos. 1519-H; 1520 and 1524; 1290; 1506-1519 A, B, C, D, E, F, & G/1982.

2/14/89 Petition Under Post Conviction Hearing Act filed. (3)

3/29/89 Commonwealth's Response to Defendant's Petition under the Post Conviction Hearing Act filed.

* * *

05/26/89 Supplemental Reasons in Support of PCHA Petition and Order filed. s/Toole, J. (all nos.)

* * *

10/07/91 Second Set of Supplemental Reasons in Support of PCHA Petition filed.

* * *

12/23/92 CHARGE: CRIMINAL HOMICIDE-MULTIPLE COUNTS.; APPEAL HEARING: The matter is submitted to the court on briefs. The court will take the matter under advisement s/ Toole, P.J. (NOS. 1290 et'al of 1982)

9/08/93 Opinion and Order filed. s/ Toole, P.J. PCHA IS DENIED. (NOS. 1290, 1506, 1507, 1508, 1519, 1520, & 1524 of 1982)

9/15/93 Notice of appeal filed. (Nos. 1290 et'al/82)

* * *

U.S. District Court
Middle District of Pennsylvania (Williamsport)
CIVIL DOCKET FOR CASE #: 4:96-cv-00294-JFM

* * *

Filing Date	#	Docket Text
02/21/1996	1	MOTION by petitioner George E. Banks to proceed IFP, for stay of Execution and for appt. of Fed. Habeas Corpus Counsel (bs) (Entered: 02/21/1996)

* * *

02/22/1996	4	ORDER by Judge James F. McClure Jr. – 1. granting motion to proceed IFP, subject to Banks filing completed affidavit showing entitlement (a) Clk to provide Banks w/copy of form used for applic. to proceed ifp (b) Banks to file same within 2 wks of its receipt from Clk. 2. Banks motion for appt of counsel granted. 3. Al Flora, Jr., Esq., and William Ruzzo, Esq., appt to represent Banks in these proceedings. 4. Banks motion for stay of execution GRANTED and execution sched for wk of 3/3/96 stayed. 5. C of PA and any official or employee thereof, shall NOT carry out any sentence of death as imposed by Ct of Common Pleas, Luzerne Cty on 6/22/83, in Case Nos. 1290, 1506, 1507, 1508, 1519 A-H, and 1524 of 1982, pending further order of this Ct. 6. Banks to file petition for writ of h.c. pursuant to 28:2254 on or before 3/22/96. 7. Banks to file brief in support of petition on or before 4/12/96. 8. Ct will direct any further briefing and/or response by Commonwealth parties after initial review pursuant to Rule 4 of Rules Governing Section 2254 Cases, 28 USC following 2254. Notice of compliance Pet. H.C. 3/22/96 for George E. Banks (cc: all counsel, Court of Appeals, Depy. Genl. Counsel Syndi Guido, Ofc of Governor of PA, supt. SCI-Rockview,

Supt. SCI Greene, Chief Judge Rambo, M.D.PA. FAXED to Marcy Waldron Ct of Appeals, Syndi Guido, Ofc of Governor PA, Supt SCI-Rockview, D. Pilletz, 1st Asst D.A., Luzerne Cty, Chief Judge Rambo M.D.PA, Supt. SCI-Greene, Counsel for Pet. Banks, Clerk of Court-Scranton, Kevin Calpin Clk. Ofc. Scranton) (bp) (Entered: 02/23/1996)

* * *

03/21/1996	8	PETITION FOR WRIT OF HABEAS CORPUS by a Person in State Custody filed on behalf of Plf George E. Banks, w/attached exhibits (bp) (Entered: 03/21/1996)

* * *

04/29/1996	20	ORDER by Judge James F. McClure Jr. denying motion to remand for State Court proceedings and to hold Federal Habeas Corpus proceedings in abeyance [9-1] (cc: all counsel, Judge Rambo, Court of Aappeals [sic], Clerk-SCSRN, Kevin Calpin, Supt Mazurkiewicz, Gov. Ofc,.) (bp) (Entered: 04/29/1996)

U.S. District Court
Middle District of Pennsylvania (Williamsport)
CIVIL DOCKET FOR CASE#: 4:99-cv-00438-JFM

* * *

Filing Date	#	Docket Text
03/22/1999	1	PETITION FOR WRIT OF HABEAS CORPUS – filed on behalf of petitioner George E. Banks; with attached exhibits. (ts) (Entered: 03/23/1999)

* * *

Filing Date	#	Docket Text
05-07-1999	11	MEMORANDUM AND ORDER by Judge James F. McClure Jr. – Petition by Petitioner Banks for writ of habeas corpus pursuant to 28:12254 dismissed in part pursuant to Rule 4 of Ruls Governing Section 2254 Proceedings in U.S. District courts, 28 USC following 2254. Grounds 7, 9, 11 and 12 of petition dismissed. Answer ddl 5/24/99 for Martin Horn, for Commonwealth of Penn, for Raymond Colleran, for James E. Price Petitioner directed to filed by 6/1/99 brsup of petition. Respondents to file bropp by 6/21/99. Petitioner may file rlybr in supply of petition by 7/5/99. Parties reminde4d [sic] that briefs are to be in conformance w/Local Rule 5.1-5.3, 7.5-7.8 inclusive. Record of state court proceedings having been furnished to this court, parties are relieved of any obligation to provide same (cc: all counsel, C/A3, w/update sheet, Supt. Price, Supt. Mazurkiewicz, Petitioner Banks, Atty Genl of f PA, Guido of Gov. Ofc. Commissioner Horn, Supt. Colleran, Clerk of Court, Operations Mgr, Chif Judge Rambo) (bp) (Entered: 05/07/1999)

* * *

08/18/1999	25	MEMORANDUM AND ORDER by Judge James F. McClure Jr. denying Petitioner's motion for leave to file amended petition [23-1] denying habeas corpus petition [1-1]. We certify pursuant oi 28:2253(e); FRAP 22(b), that Banks has made a substantial showing of the denial of a constitutional right, specifically on the issue of whether the Third Circuit's opinion in Frey v. Fulcomer, 132 F. 3d 916 (3d Cir. 1997), cert. denied, 118 S. Ct. 2076 (1998), controls our consideration of Banks' petition and therefore requires issuance of the writ of habeas corpus. The Stay of execution issued by this court shall remain in effect pending further order of court. Case terminated (cc: all counsel) (bp) (Entered: 08/18/1999)

* * *

09/24/1999	29	Notice of appeal by petitioner George E. Banks from District Court order filed 9/16/1999 [28-1] (Filing fee not paid, TPO mailed to attorney, certified copies, notice of appeal, order being appealed, with info/ack letter to USCA (cc: cnsl, Ct.) (lg) (Entered: 09/24/1999)

* * *

04/21/2003 37 JUDGMENT of USCA (certified copy) as to [29] Notice of Appeal filed by George E. Banks, dated 4/21/03 and issued in lieu of a formal mandate. ORDERED AND ADJUDGED that Banks's sentence, as set forth in the Order of the District Court enter on 9/16/99, be and the same is hereby vacated and the case is remanded with directions to grant a provisional writ of habeas corpus directing resentencing, all of the above in accordance with the opinion of this court. (bp) (Entered: 05/19/2003)

* * *

US Court of Appeals for the Third Circuit

* * *

96-9003 Banks v. Horn, et al

10/7/96 DEATH PENALTY CASE DOCKETED. Notice filed by George E. Banks. ☐ (mmb)

* * *

10/7/96 ORDER appointing office of Public Defender of Luzerne County as CJA counsel to represent Appellant, filed. (mmb)

* * *

10/21/96 APPEARANCE from Attorneys Peter P. Olszewski & Scott C. Gartley on behalf of Appellees, filed. (mmb)

10/21/96 APPEARANCE from Attorneys Al Flora & William Ruzzo on behalf of Appellant George E. Banks #AY-6066, filed. (mmb)

* * *

11/29/96 MOTION filed by Appellant to hold appellate proceedings in abeyance pending the PA State Courts' disposition of a Petition for State Post Conviction Relief ZZ and to hold briefing schedule until thirty ZZ# (30) days after and Unfavorable Order is entered on this motion. Answer due 12/9/96. Certificate of Service dated 11/27/96. (awi)

12/4/96 Clerk's letter to counsel advising the deadline for appellant's brief & appendix has been extended pending disposition of the pending motion for stay of appellate proceedings. In the event the Court denies the motion for stay, appellant's brief and appendix shall be filed and served within ten days from the date of the Court's order denying appellant's motion for stay. (mmb)

12/11/96 RESPONSE by Appellees in Opposition to motion to hold appellate proceedings in abeyance, received. Certificate of service dated 12/9/96. (awi)

12/18/96 ORDER (Sloviter, Chief Judge, Authoring Judge, Greenberg and McKee, Circuit Judges) denying motion by appellant to hold appellate proceedings in abeyance. Appellant shall file his brief within 30 days of the date of this order. The remaining briefs are due pursuant to the court's applicable rules, filed. (ddw)

1/17/97 BRIEF/APPENDIX on behalf of Appellant George E. Banks #AY-6066, Pages; 34, Copies:

10, Delivered by hand, filed. Certificate of Service Date 1/17/97. (bmh)

2/18/97 BRIEF on behalf of Appellees Martin Horn, James Price, Joseph Mazurkiewicz, Comm of PA, Pages; 33, Copies: 10, Delivered by mail, filed. Certificate of Service date 2/18/97. (bmh)

3/4/97 REPLY BRIEF on behalf of Appellant George E. Banks #AY-6066, Copies: 10, Delivered by mail, filed. Certificate of service date 3/4/97. (bmh)

* * *

8/12/97 ARGUED 8/12/97 Panel: Sloviter, Chief Judge, Greenberg, and McKee, Circuit Judge. (rr)

* * *

9/19/97 PUBLISHED OPINION (Sloviter, Chief Judge, Greenberg, Authoring Judge, McKee, Circuit Judges), filed. (ctc)

9/19/97 JUDGMENT, vacated and the cause remanded to the said District Court for dismissal of the petition without prejudice as mixed. All of the above in accordance with the opinion of this Court, filed. (ctc)

10/14/97 MANDATE ISSUED, filed. (lkj)

* * *

US Court of Appeals for the Third Circuit

* * *

99-9005 Banks v. Horn, et al

9/28/99 CIVIL CASE DOCKETED. Notice filed by George E. Banks. (clc)

9/28/99 ORDER appointing CJA counsel, Albert Flora, Jr., Esq. to represent Appellant, filed. (clc)

9/28/99 ORDER appointing CJA counsel, William Ruzzo, Esq. to represent Appellant, filed. (clc)

* * *

10/4/99 MOTION by Appellant for certificate of appealability which may be construed as a motion to Expand the Certificate of Appealability, filed. Answer due 10/14/99. Certificate of Service dated 10/1/99. (clc)

10/12/99 APPEARANCE from Attorney Scott C. Gartley on behalf of Appellee Comm of PA, filed. (clc)

* * *

10/12/99 MEMORANDUM OF LAW IN SUPPORT of motion for certificate of appealability which shall be construed as a Memorandum in Support of Expanding the Certificate of Appealability on behalf of Appellant George E. Banks, filed. Certificate of service date 10/8/99. (clc)

* * *

11/9/99 RESPONSE filed by Appellee Comm of PA to motion to expand certificate of appealability. Certificate of service dated 11/8/99. (clc)

6/27/00 ORDER (Sloviter, Authoring Judge, Roth, Rendell, Circuit Judges) granting motion for certificate of appealability pursuant to 28 U.S.C. section 2253(c)(2) and L.A.R. 22.1 limited to issue (1), whether Petitioner effected a knowing intelligent, and voluntary waiver of his Sixth Amendment right to assistance of counsel. In all other respects, Petitioner's Application for Certificate of Appealability is ZZ#DENIED. The Clerk to set the briefing schedule, filed. (clc)

* * *

8/7/00 BRIEF on behalf of Appellant George E. Banks #AY-6066, Pages: 27, Copies: 10, Delivered by mail, filed. Certificate of service date 8/7/00. (mow)

* * *

9/11/00 BRIEF on behalf of Appellee Comm of PA, With Certificate of Compliance pursuant to F.R.A.P. 32(a)(7)(B)(i). Pages: 36, Copies: 10, Delivered by mail, filed. Certificate of Service date 9/11/00. (lal)

* * *

9/26/00 MOTION by Appellant titled Motion for Leave to Discontinue Appeal which the court may wish to construe as a motion to extend time to file reply brief, filed. Answer due 10/10/00. Certificate of Service dated 9/26/00. (clc)

9/29/00 ORDER (Sloviter, Authoring Judge, Roth, Rendell, Circuit Judges) granting motion to extend time to file reply brief which is unopposed. The Clerk shall fix the date when the reply brief will be issued, filed. (clc)

* * *

10/5/00 ORDER (Clerk) directing the Prothonotary of the Court of Common Pleas, Luzerne County to forward the state court record in ZZ_Commonwealth ZZ_v. ZZ_Banks to the Clerk of this Court, filed. (mgd)

* * *

10/6/00 REPLY BRIEF on behalf of Appellant George E. Banks #AY-6066, Copies: 10, Delivered by mail, filed. Certificate of service date 10/6/00. (dhd)

* * *

10/12/00 MOTION by Proposed Amicus-Appellant PA Assn Crim Def and, Louis M. Natali for leave to proceed as amicus curiae, to file brief out of time and for enlargement of page limitation for brief to 56 Pages, filed. Answer due 10/25/00. Certificate of Service dated 10/12/00. (lal)

1/12/01 ORDER (Sloviter, Authoring Judge, Roth and Rendell, Circuit Judges) granting motion by PA Assn Crim Def and Louis M. Natali for leave to proceed as amicus curiae in support of Appellants, to file brief out of time and for enlargement of page limitation to 56 pages with filing as of the date of this order, filed. (lal)

1/12/01 AMICUS BRIEF on behalf of PA Assn Crim Def and Louis M. Natali in support of Appellants. Pages: 56, Delivered by mail, filed. Certificate of service date 10/12/00. (lal)

1/17/01 APPEARANCE from Attorney Peter Goldberger on behalf of Amicus-appellant PA Assn Crim Def, filed. (clc)

* * *

2/5/01 APPEARANCE from Attorney Louis M. Natali on behalf of Amicus-appellant PA Assn Crim Def and Louis M. Natali, filed. (clc)

2/16/01 CLERK'S LETTER to counsel written at the direction of the Court advising counsel that the Court has noted that the Supreme Court has granted certiorari in the ZZ_Duncan ZZ_v. ZZ_Walker, No. 00-121, on the question of "Does prior federal habeas corpus petition qualify as "application for State post-conviction or other collateral review within meaning of 28 U.S.C. Section 2244(d) . . . The Court would like counsel's view as to whether it should hold in abeyance further proceedings

in this matter pending the Supreme Court's decision in the ZZ_Duncan case. Counsel is requested to file an original and three copies of contemporaneous letters reponding to this question. (See letter for specifics.) Response due by 3/5/01. (clr)

3/5/01 ANSWER received dated March 1, 2001, from Al Flora, Jr., Esq. and William Ruzzo, Esq., counsel for Appellant, in accordance with the Court's request of February 21, 2001 requesting counsel's view as to whether it should hold this case in abeyance, filed. (mac)

3/6/01 ANSWER dated March 5, 2001, received from Scott C. Gartley, Esq., Counsel for Appellee, in accordance with the Court's request of February 16, 2001, requesting counsel to address whether this matter should be held in abeyance, from Appellee Comm of PA, filed. (clr)

3/7/01 CLERK'S LETTER to counsel written at the direction of the Court advising counsel that Court will proceed with argument in the above case as scheduled for April 2, 2001, at 3:00 p.m. (clr)

* * *

3/26/01 CLERK'S LETTER to counsel written at the direction of the Court, the government is instructed to be prepared at oral argument to address the issue of the timeliness of the second habeas petition, including why the government's failure to cross-appeal is not a waiver. If the parties wish, they may submit letter memoranda on this issue, these shall be filed in the Clerk's Office not later than noon on Thursday, March 29, 2001. Response due by 3/29/01. (mac)

* * *

3/28/01 ANSWER dated March 28, 2001, received via facsimile from Scott C. Gartley, Esq., counsel for Appellee, addressing the issue of the "timeliness of the second habeas petition, including why the government's failure to cross-appeal is not received in accordance with the court's request from Appellee Comm of PA, filed. (clr)

3/29/01 ANSWER dated March 28, 2001, received from Al Flora, Jr., Esq., counsel for Appellant, addressing the issue of the "timeliness of the seconf habeas petition, including why the government's failure to cross-appeal is not a waiver, in accordance with the Court's request of March 26, 2001, from Appellant George E. Banks #AY-6066, filed. (clr)

* * *

4/2/01 ARGUED Monday, April 2, 2001 Panel: Sloviter, Roth and Rendell, Circuit Judges. Counsel is directed to file 4 copies of the verdict slip. (Should be given to Patricia Coleman for processing.) (mac)

4/2/01 COURT RESPONSE REQUEST AT ORAL ARGUMENT to Appellant to provide 4 copies of verdict slip (give to Patricia Coleman for processing.) Response due by 4/9/01. (mac)

4/9/01 ANSWER received in accordance with the Court's request at Oral Argument from Appellant George E. Banks, filed. (nmb)

10/31/01 PUBLISHED OPINION (Sloviter, Roth, Rendell, Authoring Judge and Circuit Judges), filed. (clc)

10/31/01 JUDGMENT vacated and the case is remanded for resentencing, filed. (clc)

11/14/01 PETITION by Appellee for rehearing en banc, filed. Certificate of service dated 11/14/01. (clc)

11/14/01 Brief of Amicus Curiae in Support of Appellee Petition for Rehearing En Banc, filed. (clc)

* * *

12/11/01 ORDER (Chief Judge Becker, Mansmann, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Authoring Judge, Barry, Ambro and Fuentes, Circuit Judges) denying petition for in banc rehearing by Appellee, filed. Chief Judge Becker would have granted rehearing. (clc)

* * *

12/18/01 MOTION by Appellee to stay mandate pending the filing of a petition for a writ of certiorari, filed. Answer due 1/2/01. Certificate of Service dated 12/18/01. (clc)

* * *

1/29/02 ORDER AMENDING PUBLISHED OPINION (Sloviter, Roth, Rendell, Authoring Judge and Circuit Judges), filed. (clc)

1/30/02 ORDER (Sloviter, Roth and Rendell, Authoring Judge, Circuit Judges) granting motion to stay mandate by Appellee Comm of PA until 3/11/02, filed. (mgd)

* * *

3/14/02 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant George E. Banks. Filed in the Supreme Court on 3/4/02 at Supreme Ct. case number: 01-8875. (clc)

3/14/02 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee

Comm of PA. Filed in the Supreme Court on 3/11/02 at Supreme Ct. case number: 01-1385. (clc)

5/31/02 U.S. Supreme Court order dated 5/28/02 at S.C. number: 01-8875, denying petition for writ of certiorari by Appellant George E. Banks, filed. (clc)

6/17/02 U.S. Supreme Court opinion on behalf of Martin Horn, et al, filed (Opinion filed in the S.C. on 6/17/02). (clc)

6/17/02 CALENDARED for Monday, June 17, 2002. (clr)

* * *

7/22/02 SUPREME COURT ORDER filed 6/17/02 vacating the judgment and remanding the cause to this Court for further consideration. (sma)

7/26/02 U.S. Supreme Court letter filed advising this court that a petition for rehearing in the above-entitled case was timely filed on July 12, 2002, and was received in the office on July 18, 2002. The judgement of the Supreme Court issued on July 17, 2002 is recalled, filed. (clc)

8/8/02 U.S. Supreme Court order dated 8/5/02 at S.C. number: 01-8875, denying petition for rehearing, filed. (mgd)

9/18/02 CLERK'S LETTER to counsel written at the direction of the Court advising counsel that in light of the Supreme Court's remand order requiring the panel to engage in an analysis under ZZ_TeagueZZ_ regarding the retroactive application of ZZ_MillsZZ_ in this matter, the Court will permit counsel to file supplemental briefing on this issue, if they wish to do so, focusing on this issue. (See letter for specifics.) The Court will consider the existing briefing in ZZ_TeagueZZ_ and seeks only such additional

argument or case law that would like the Court to consider. The Commonwealth should submit its brief within 20 days of the date of this letter, and Banks shall file his brief within 10 days thereafter. The briefs shall not exceed words each. Response due by Commonwealth on 10/8/02 and Banks on 10/18/02. (clr)

10/8/02 ANSWER/Appellees' Memorandum of Law Regarding the Retroactive Application of ZZ_MillsZZ_ ZZ_v.ZZ_ ZZ_ ZZ_MarylandZZ_, dated October 8, 2002, received from Scott C. Gartley, Esq. counsel for Appellee, in direct response to the Court's request of September 18, 2002, filed. (clr)

10/18/02 ANSWER/Appellant's Supplemental Brief, dated October 17, 2002, received from Albert J. Flora, Jr., Esq., counsel for Appellant, in direct response to the Court's request at oral argument, filed. (clr)

1/6/03 MOTION by Amicus-appellants PA Assn Crim Def and Louis M. Natali for leave to file amicus curiae supplemental brief, filed. Answer due 1/20/03. Certificate of Service dated 1/6/03. (mcw)

1/14/03 ORDER (Sloviter, Authoring Judge, Roth and Rendell, Circuit Judges) denying motion to file supplemental brief by Amicus-appellant PA Assn Crim Def as untimely, filed. (clc)

1/14/03 PUBLISHED PRECEDENTIAL REPORTED OPINION (Sloviter, Roth and Rendell, Authoring Judge, Circuit Judges), with separate concurring opinion by Judge Sloviter, filed. (clc)

1/14/03 JUDGMENT vacated and the case is remanded with directions to grant provisional

writ of habeas corpus directing resentencing, filed. (clc)

2/4/03 MOTION by Appellee to stay mandate pending the Filing of a Petition for a Writ of Certiorari, filed. Answer due 2/17/03. Certificate of Service dated 2/3/03. (clc)

2/5/03 ORDER (Sloviter, Authoring Judge and Roth, Circuit Judges) granting motion to stay mandate by Appellee Comm of PA. Mandate Stayed to 3/6/03, filed. (clc)

3/7/03 MOTION by Appellee for extension of the stay of the mandate filed. Answer due 3/20/03. Certificate of Service dated 3/7/03. (clc)

3/11/03 ORDER (Sloviter, Authoring Judge, Roth and Rendell, Circuit Judges) granting motion to stay mandate by Appellee, filed. (clc)

4/21/03 MANDATE ISSUED, filed. (clc)

5/12/03 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee Comm of PA. Filed in the Supreme Court on 5/7/03 at Supreme Ct. case number: 02-1603. (mgd)

* * *

6/5/03 ORDER (Clerk) recalling certified judgment issued in lieu of a formal mandate, filed. (ghb)

* * *

10/20/03 U.S. Supreme Court order dated 9/30/03, at S.C. number: 02-1603, granting petition for writ of certiorari by Appellee Comm of PA, filed. (mgd)

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY –
vs.	:	
GEORGE E. BANKS,	:	
Defendant	:	CRIMINAL NOS. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982

STENOGRAPHER'S RECORD (VOLUME VI)

of trial in the above-captioned matters before Hon. Patrick J. Toole, Jr., A.L.J., and a Jury, in Courtroom #4, Luzerne County Court House, Wilkes-Barre, Pennsylvania, commencing on Monday, June 6, 1983. (Sessions June 20, 21, 22, 1983).

APPEARANCES:

ROBERT J. GILLESPIE, JR., ESQ.,
District Attorney;
LAWRENCE M. KLEMOW, ESQ.,
Assistant District Attorney;
MICHAEL D. BART, ESQ.,
Assistant District Attorney,
for the Commonwealth;

BASIL G. RUSSIN, ESQ.,
Public Defender;
JOSEPH F. SKLAROSKY, ESQ.,
First Assistant Public Defender;
ALBERT J. FLORA, JR., ESQ.,
Assistant Public Defender,
for Defendant.

* * *

[2,315] THE COURT: Members of the jury, you must now decide whether the defendant in this case is to be sentenced to death or to life imprisonment on each of

the Informations upon which you have returned a verdict of guilty of murder in the first degree.

The sentence you imposed will depend upon your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.

The verdict must be a sentence of life imprisonment in all other cases.

[2,316] The Crime Code defines aggravating and mitigating circumstances. For the purposes of this hearing, only the following matters, if established beyond a reasonable doubt, can constitute an aggravating circumstance. As I indicated to you, there will be three submitted for your consideration.

The first is that the defendant, in the commission of the offense, knowingly created a grave risk of death to another person in addition to the victim. You must ask yourselves: Did this defendant, at the time he committed the act in question, knowingly create a grave risk of death to another person? Did he or should he have reasonably foreseen a risk to neighbors or someone else? Did he contemplate and did he, in fact, cause such a risk?

In order to find that aggravating circumstance present, you must be satisfied that it exists beyond a

reasonable doubt. If you are not so satisfied, then it is not and you cannot consider it an aggravating circumstance.

The second submitted to you reads: "The defendant has a significant history of felony convictions involving the use or threat of violence to the person." In this regard, you have been informed, through the stipulation, that this defendant, approximately twenty years ago, was convicted of the offenses of attempted armed robbery and felonious assault with intent to kill. These two criminal [2,317] convictions arose out of one incident, for which the defendant received terms of imprisonment which were directed to be served concurrently. That means together.

You have also been told that the Governor of the Commonwealth of Pennsylvania, at a later date, commuted that sentence.

You must decide whether or not those convictions arising out of that incident constitute a significant history of felony convictions. If you are satisfied beyond a reasonable doubt that it does, then you may consider that an aggravating circumstance. If you are not satisfied beyond a reasonable doubt that these constitute a significant history, then you should not consider or find it as an aggravating circumstance.

The third submitted is that the defendant has been convicted of another federal or state offense committed either before or at the time of the offense at issue for which a sentence of life imprisonment or death was imposable, or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. There is no question, in this case, that this defendant was not, at the time, undergoing a

sentence of life imprisonment for any reason, so your determination must be only as to the first part.

You must decide whether or not the other eleven [2,318] killings which you found to be first degree and for which a penalty of death could be imposed constitutes an aggravating circumstance. You may consider it as such only if you are satisfied beyond a reasonable doubt that it is such a circumstance.

For the purposes of this case, the following matters, if proven by a preponderance of the evidence, constitute mitigating circumstances. And once again, you will recall, three have been submitted for your consideration.

The first is that the defendant was under the influence of extreme mental or emotional disturbance. And at this point, I have to stop and tell you that the law to be applied at this stage of the proceeding is not the same as the test offered to you in determining sanity in the guilt part of this trial.

You will recall, in the last part of the trial, you were told that our interest in the insanity case is as to the defendant's cognitive abilities, his intellectual abilities, and you were specifically advised that emotional instability did not constitute insanity. I will instruct you that at this stage of the proceeding, we are not dealing with insanity. We are, in fact, at this point, now interested in the volitional, as well as the emotional, difficulties of the defendant, and you may consider them, if you find them to exist by a preponderance of the evidence, to [2,319] the extent that he was under the influence of extreme mental or emotional disturbance. Do you find, from the evidence, the existence, first, of a mental disturbance or an emotional disturbance? If you do, you must then determine

whether it is severe or not. If it is, you may, if you are satisfied by a preponderance of the evidence that it exists, consider that a mitigating circumstance.

The second mitigating circumstance offered to you is that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. I want to go back again to the instructions I gave you at the close of the guilt-or-innocence portion of the case. And at that time, I told you this:

Under the Pennsylvania test for insanity, a defendant either understands the nature and quality of his acts or he does not. He is either able to distinguish between right and wrong or he is not. The test in Pennsylvania, unlike in Maryland, where they absolve a defendant who lacks substantial capacity, is not the test in Pennsylvania.

I want you to know that at this part of this proceeding, Pennsylvania does employ the same test that Maryland does. The issue is not whether he understood or knew the nature or quality of his act, or whether he was able to distinguish between right and wrong. The issue is [2,320] now: Did he have the capacity to appreciate? And I suggest to you that "appreciate" has a much different meaning. "Appreciate" means to judge or evaluate the worth, the merit, the quality or significance of; to comprehend with knowledge, judgment and discrimination; to judge with heightened perception or understanding; to be fully sensible of. Was this defendant aware of the criminality of his conduct? Did he appreciate the criminality of his conduct?

And also, you will recall I said to you to be legally insane, the defendant must be completely or totally

unable. And I told you that we don't have degrees of incapacity when it comes to insanity. But when it comes to sentencing, you will notice that the test is: Was his ability to appreciate, his capacity to appreciate, was his conduct able to conform to the requirements of the law? And we want to know, was either his capacity or ability impaired? The test is, was it impaired? Was it substantially impaired? If it was, and you find that from a preponderance of the evidence, you may consider that a mitigating circumstance.

And the final mitigating circumstance submitted to you is whether there is any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense. And you have heard the arguments of counsel. You have heard the evidence. And you will make that determination on the basis of all the evidence you have [2,321] heard and the arguments of counsel.

Once again, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence. The preponderance of the evidence is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other or, as has been explained to you, a preponderance exists whenever the scales tip ever so slightly. That's a preponderance.

All the evidence from both sides that was submitted to you during the course of this trial shall be considered by you. All the evidence from both sides, including the evidence you heard earlier as to aggravating or mitigating

circumstances, is important and proper for you to consider. You should not decide, as you have been told, out of any feelings of vengeance or prejudice toward the defendant. You must decide this case on the basis of the evidence presented and the arguments offered to you.

The verdict, ladies and gentlemen, is for you. Remember and consider all the evidence, giving it the weight to which it is entitled. Remember that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment on each Information. Remember, again, your verdict in [2,322] each case must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.

Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances.

In all other cases, your verdict would be life imprisonment.

You're going to be given a verdict slip. There are twelve of them. Again, I think they are self-explanatory, but I want you to know this additional thing:

A mitigating circumstance, if found to exist, need not outweigh an aggravating circumstance in order to find in favor of life imprisonment. If, after you consider all the evidence and the arguments of counsel, you place the aggravating circumstances you find, if any, on the scale of justice and you weigh them, if, after you do that, the scales

are still balanced, then your sentence must be life imprisonment. If the scales tip in favor of the mitigating circumstances, your verdict must be life imprisonment. And if you find the existence of one or more aggravating [2,323] circumstance and one or more mitigating circumstance, and you weigh them, you can only return death if it weighs in favor of the aggravating.

That, ladies and gentlemen, is this case. If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me. If, in my opinion, further deliberations will not result in a unanimous agreement on the sentence, then I will tell you it will become then my duty to impose a sentence of life imprisonment on each Information.

The verdict slips, one copy of which you will be given, read, as follows, and I'll go over it. It starts out by saying, "We, the jury, unanimously sentence the defendant in the above-entitled matter to," and then there are only two possible sentences: death and life imprisonment. You will check the appropriate one.

If your sentence is death, then you are required to complete the rest of the verdict form.

The second question indicates to be completed if the sentence is death, and then it reads: "We, the jury, have found unanimously," and then it says, "at least one aggravating circumstance and no mitigating circumstance." And then, if you have done that, you will check the first. And then it tells you you must note which aggravating circumstance, if any, you found, or circumstances, if any, you found.

[2,324] If you find, again, no aggravating circumstances, then the verdict is life imprisonment. If you find at least one aggravating circumstance and at least one mitigating circumstance, then you are required by law to weigh them. And the only way you can then return a verdict of death is if you conclude that the aggravating circumstance outweighs the mitigating. And that is the second part, where it indicates one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances. And if that's the part of the verdict you employ, you will make the appropriate check marks.

I have also listed, with the agreement of counsel, the three aggravating circumstances being submitted for your consideration, as well as the three mitigating circumstances being submitted to you for your consideration.

That's the law as it applies to this case, to this part of the proceeding. Once again, I remind you that your duties are important; they are serious. There is no more awesome responsibility, no more awesome duty imposed on anyone in this world than that which is now placed in your hands.

Anything further, gentlemen?

MR. GILLESPIE: Nothing further, Your Honor.

MR. SKLAROSKY: Just one item. May we approach side bar, Your Honor.

THE COURT: Certainly.

[2,325] [The following transpires at side bar, out of hearing of the jury:

MR. SKLAROSKY: In the Court's Charge, whereby the Court goes on to say, "Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances – " and then the Court inserted the word "then" – "outweigh any mitigating circumstances," I submit that by the insertion of the word "then," it presumes that the aggravating circumstance will outweigh the mitigating circumstance.

THE COURT: Use of the word "then," okay. Obviously, I don't recall it, but I will try to clear it up.]

[Court resumes Charge.]

THE COURT: Counsel has indicated that in the course of my remarks to you, I may have made some statement that may be confusing. I hope not. But, hopefully, to avoid any confusion, let me see if I can do it a different way.

I have told you there are three aggravating – statutorily-defined aggravating circumstances being submitted for your consideration, along with three statutorily-defined mitigating circumstances for your consideration.

You must decide, on the basis of the evidence as you have heard it whether those circumstances do, in fact, exist. In order to find that an aggravating circumstance [2,326] exists, you must be satisfied that it has been established by the Commonwealth beyond a reasonable doubt.

In order to find a mitigating circumstance, you must be satisfied that it has been established not beyond a

reasonable doubt, but simply, by a preponderance of the evidence.

After you have considered all of the evidence, you will then ask yourselves: Did the Commonwealth prove any aggravating circumstances – any one of the three or two or all or none? If there are not aggravating circumstances found by you to exist, your verdict must be life imprisonment. If you find beyond a reasonable doubt the existence of any one or more aggravating circumstance, then you must determine whether there existed in this case any mitigating circumstance.

If you find, by a preponderance of the evidence, that there is one or more mitigating circumstances and you have found that there is one or more aggravating circumstances, then you must weigh them, and the only way you can return a death verdict is if, when you weigh them, the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances that you have found.

Again, if when you place them on the scale, the scale does not tip in favor of aggravating, your verdict must be life. If when you place them on the scale, the [2,327] scale, is still equally balanced, your verdict must be life. The only way the penalty must be death is if, when you weigh them, the scales tip in favor of the aggravating circumstances.

Is that clear, gentlemen?

MR. SKLAROSKY: Thank you, Your Honor.

MR. GILLESPIE: Your Honor, may counsel approach the bench?

THE COURT: Certainly.

[Sidebar discussion follows, off record.]

THE COURT: I indicated that the only way you could return death is if the scales outweighed in favor of aggravating. That, obviously, the weighing only occurs if you find the existence of one or more aggravating and one or more mitigating. That's the only time you weigh. If you find the existence of an aggravating and no mitigating, then there is no weighing. The penalty is death.

Does that clear it up, gentlemen?

MR. GILLESPIE: Thank you, Your Honor.

* * *

[2,332] MR. SKLAROSKY: We ask for a jury poll, Your Honor.

THE COURT: Thank you.

Ladies and gentlemen, you may be seated.

Ladies and gentlemen, counsel has asked for a poll. You will recall that simply means you will be called upon to rise and respond whether your verdict was, in each of the twelve cases, life or death.

The Foreman has indicated, as has been publicly read, that the decision of death was based upon your finding one or more aggravating circumstance which outweighs any mitigating circumstance. He further indicated that the aggravating circumstance was No. 3; the mitigating circumstance was No. 1.

I will call upon each of you individually. I will ask you to rise and indicate whether your verdict in each case,

what it was, and whether or not you agreed with the statement made by the Foreman that you found one aggravating circumstance as noted, one mitigating circumstance as noted, and that the aggravating circumstance outweighed the mitigating.

[2,333] THE COURT: Marie Parise, will you tell me, please, your verdict, your sentence in the case of Regina Clemens.

JUROR NO. 1, MARIE PARISE: Death.

THE COURT: And was that on the basis – on what basis was that if you can tell me?

JUROR NO. 1: One or more aggravated circumstance that outweighed any mitigating circumstance or circumstances.

THE COURT: And what number aggravating circumstance did you find?

JUROR NO. 1: Three.

THE COURT: What mitigating circumstance did you find?

JUROR NO. 1: One.

THE COURT: With regard to Information No. 1519-E, Susan Yuhas Banks, what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the very same then criteria?

JUROR NO. 1: Yes, sir.

THE COURT: What was your sentence in 1519-C, Bowendy Banks?

JUROR NO. 1: Death.

THE COURT: Was that based on the same criteria, or anything different?

JUROR NO. 1: The same.

[2,334] THE COURT: On No. 1519-D, Dorothy Lyons, what is your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: No. 1519-A, Nancy Lyons, what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And in the case of Foraroude Banks, what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same circumstances – the same mitigating and same aggravating?

JUROR NO. 1: Yes, sir.

THE COURT: No. 1519-F, Mauritania Banks, what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And in No. 1519-B, Montanzima Banks, [2,335] what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And in No. 1508, Kissmayu Banks, your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And in No. 1290, Sharon Mazzillo?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And No. 1507, Scott Mazzillo?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And No. 1506, Alice Mazzillo?

JUROR NO. 1: Death.

THE COURT: Thank you. You may be seated.

Mrs. Young, tell us, please, your sentence in [2,336] No. 1519-G, Regina Clemens.

JUROR NO. 2, NANCY KRAMER YOUNG: Death.

THE COURT: And will you tell us if that was based on the criteria set forth by the Foreman.

JUROR NO. 2: Yes.

THE COURT: No. 1519-E, Susan Yuhas Banks, will you tell us, please, your sentence.

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: Bowendy Banks, No. 1519-C?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

[2,337] THE COURT: Next, Information No. 1519, Foraroude Banks?

JUROR NO. 2: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 2: Death.

THE COURT: Same Criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 2: Death.

THE COURT: Same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 2: Death.

THE COURT: And that was based on the same criteria?

JUROR NO. 2: Yes, Your Honor.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 3: Death.

[2,338] THE COURT: Based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: Thank you.

DEFENDANT: It's not your fault. You were lied to, ma'am. A two-hour exhumation would have proved me innocent.

THE COURT: All right, Mr. Banks.

Mr. Kaib, No. 1519-G, will you tell us, please, your sentence, sir.

JUROR NO. 3, WILLIAM KAIB: Death.

THE COURT: And was that based on the criteria outlined by the Foreman?

JUROR NO. 3: Yes.

THE COURT: No. 1519-E, Susan Yuhas Banks, your sentence?

JUROR NO. 3: Death.

THE COURT: Was that on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 3: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 3: Yes, sir.

[2,339] THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 3: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 3: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 3: Yes.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 3: Death.

THE COURT: Was that on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 3: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 3: Death.

THE COURT: Was that on the same basis or criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1508, Kissmayu?

JUROR NO. 3: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 3: Death.

[2,340] THE COURT: Was that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 3: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 3: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: Thank you.

Mr. Fleming, will you tell us, please, your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 4, ROBERT FLEMING, JR.: Death.

THE COURT: And was that based on the findings announced by the Foreman?

JUROR NO. 4: Yes, it was, Your Honor.

THE COURT: No. 1519-E, Susan Yuhas Banks, will you tell us, please, your sentence.

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, sir.

THE COURT: No. 1519-C, Bowendy Banks, what was [2,341] your sentence?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519-D, Dorothy Lyons, what was your sentence?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

[2,342] THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: Sharon Mazzillo, No. 1290?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: Thank you.

Susan Hoffman, tell us, please, your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 5, SUSAN HOFFMAN: Death.

THE COURT: And was that based on the criteria announced by the Foreman?

JUROR NO. 5: Yes.

THE COURT: In No. 1519-E, Susan Yuhas Banks, what was your sentence?

JUROR NO. 5: Death.

[2,343] THE COURT: Was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 5: Death.

THE COURT: Was that on the same criteria?

JUROR NO. 5: Yes.

[2,344] THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 5: Death.

THE COURT: Was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: Thank you.

Mr. Fuchs, will you tell me, please, your sentence in the case of Regina Clemens, 1519-G.

JUROR NO. 6, JOSEPH FUCHS: Death.

THE COURT: And was that based on the criteria announced by the Foreman?

JUROR NO. 6: Yes, it is.

THE COURT: No. 1519-E, Susan Yuhas Banks?

JUROR NO. 6: Death.

[2,345] THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 6: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes.

[2,346] THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 6: Death

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes.

THE COURT: Thank you.

Mr. Boory, tell us your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 7, THOMAS R. BOORY: Death.

THE COURT: And was that based upon the criteria you announced publicly?

JUROR NO. 7: Yes, Your Honor.

THE COURT: No. 1519-E, Susan Yuhas Banks?

JUROR NO. 7: Death.

[2,347] THE COURT: Was that on the same – based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 7: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 7: Yes, sir.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes, sir.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes, sir.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 7: Death.

[2,348] THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes, Your Honor.

THE COURT: Thank you.

Beatrice Colling, will you tell us, please, your sentence in Information 1519-G, Regina Clemens.

JUROR NO. 8, BEATRICE COLLING: Death.

THE COURT: Was that based on the criteria announced by the Foreman?

JUROR NO. 8: Yes, sir.

[2,349] THE COURT: Tell me your sentence in 1519-E, Susan Yuhas Banks.

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: 1519-C, Bowendy Banks?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 8: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 8: Death.

THE COURT: And was that based on the same criteria?

[2,350] JUROR NO. 8: Yes, sir.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 8: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 8: Yes, sir.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 8: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes, sir.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes, sir.

THE COURT: Thank you.

Ms. Steele, will you tell me your sentence in [2,351] No. 1519-G, Regina Clemens.

JUROR NO. 9, SHEILA STEELE: Death.

THE COURT: And is that based on the criteria announced by the Foreman?

JUROR NO. 9: Yes.

THE COURT: Tell me your verdict in 1519-E, Susan Yuhas Banks.

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes, it is.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 9: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes, it is.

THE COURT: Foraroude Banks, No. 1519?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

[2,352] THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes, it is.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes, it is.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: Thank you.

[2,353] THE COURT: Miss Brown, tell me your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 10, STEPHANIE BROWN: Death.

THE COURT: Is that based upon the criteria announced by the Foreman?

JUROR NO. 10: Yes.

THE COURT: Tell me your verdict in 1519-E, Susan Yuhas Banks.

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

[2,354] THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 10: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: Thank you.

[2,355] THE COURT: Miss Nelson, will you give me your verdict, your sentence in 1519-G, Regina Clemens.

JUROR NO. 11, RENEE NELSON: Death.

THE COURT: Is that based upon the criteria announced by the Foreman?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519-E, Susan Yuhas Banks.

JUROR NO. 11: Death.

THE COURT: And is that based upon the criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: 1519-D, Dorothy Lyons?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

[2,356] THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 11: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: Thank you.

[2,357] THE COURT: Mary Ellen Nehrig, will you tell me your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 12, MARY ELLEN NEHRIG: Death.

THE COURT: And is that based upon the criteria announced by the Foreman?

JUROR NO. 12: Yes.

THE COURT: No. 1519-E, Susan Yuhas Banks.

JUROR NO. 12: Death.

THE COURT: Is that based upon the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 12: Death.

THE COURT: And is that based upon the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 12: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 12: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 12: Death.

[2,358] THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 12: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 12: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 12: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 12: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 12: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 12: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

[2,359] THE COURT: Thank you.

The twelve jurors having responded that their sentence is death on each of the Informations, the verdicts and sentences are so recorded.

Is there anything further, gentlemen?

MR. SKLAROSKY: No, Your Honor.

MR. GILLESPIE: No, Your Honor.

* * *

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
:
v. : OF LUZERNE COUNTY *
: CRIMINAL
GEORGE EMIL BANKS :
: NO. 1519E OF 1982
: (SUSAN YUHAS BANKS)

VERDICT

1. WE THE JURY UNANIMOUSLY SENTENCE THE DEFENDANT IN THE ABOVE MATTER TO

✓ DEATH
_____ LIFE IMPRISONMENT

2. (TO BE COMPLETED IF THE SENTENCE IS DEATH.) WE THE JURY HAVE FOUND UNANIMOUSLY

_____ AT LEAST ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCE. THE AGGRAVATED CIRCUMSTANCE(S) (IS) (ARE):

1. _____ IN THE COMMISSION OF THE OFFENSE THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.

2. _____ THE DEFENDANT HAS A SIGNIFICANT HISTORY OF FELONY CONVICTIONS INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

3. _____ THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

OR

✓ ONE OR MORE AGGRAVATED CIRCUMSTANCE WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.

THE AGGRAVATING CIRCUMSTANCE(S) (IS) (ARE):

1. _____ IN THE COMMISSION OF THE OFFENSE THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.

2. _____ THE DEFENDANT HAS A SIGNIFICANT HISTORY OF FELONY CONVICTIONS INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

3. ✓ THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

THE MITIGATING CIRCUMSTANCE(S) (IS) (ARE):

1. ✓ THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

2. _____ THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

3. _____ ANY OTHER MITIGATING MATTER CONCERNING THE CHARACTER OR RECORD OF THE DEFENDANT OR THE CIRCUMSTANCES OF HIS OFFENSE.

/s/ Thomas R. Boory
FOREPERSON

* An identical and separate verdict slip was completed for each of the following victims: Bowendy Banks, Regina Clemens, Dorothy Lyons, Nancy Lyons, Fouraroude

Banks, Mauritania Banks, Montanzuma Banks, Kismayu Banks, Sharon Mazzillo, Scott Mazzillo, Alice Mazzillo, and Susan Yuhas Banks. The jury's findings were identical for each.

521 A.2d 1

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,
v.
George Emil **BANKS**, Appellant

Argued Oct. 20, 1986.
Decided Feb. 13, 1987.
Reargument Denied May 28, 1987.

Basil G. Russin, Al Flora, Jr., Wilkes-Barre, for appellant.

Robert J. Gillespie, Jr., Dist. Atty., Joseph C. Giebus, Asst. Dist. Atty., Wilkes-Barre, Marion E. MacIntyre, Deputy Atty. Gen., Harrisburg, for appellee.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

LARSEN, Justice.

In the early morning hours of September 25, 1982, George Emil Banks, appellant, went on a rampage in and near the City of Wilkes-Barre in Luzerne County. In the space of about one hour, appellant shot fourteen people with a Colt AR-15 semi-automatic rifle, killing thirteen and wounding one. All but one of the dead were the women and children who made up appellant's extended family; the other two victims were strangers (one survived) who were in the wrong place at the wrong time.

Following a lengthy jury trial before the Honorable Patrick J. Toole in the Court of Common Pleas of Luzerne

County (with a jury selected in Allegheny County), appellant was convicted on June 21, 1983 on twelve counts of murder of the first degree. He was also convicted of murder of the third degree, attempted murder, aggravated assault, recklessly endangering another person, robbery and theft of a motor vehicle. The next day, June 22, 1983, in a separate sentencing proceeding before the same jury, appellant received twelve sentences of death. On October 17, 1985, the Court of Common Pleas of Luzerne County, per Judge Toole, denied appellant's post-verdict motions for a new trial and/or in arrest of judgment. Appellant was formally sentenced on November 22, 1985,[1] and he now appeals his convictions and judgments of sentence.[2] We affirm.

The extensive trial record in this case, viewed in the light most favorable to the Commonwealth as verdict winner, discloses the following. On the evening of September 24, 1982, appellant attended a birthday party for one Stanley O'Brien at the Galbraith family residence in Wilkes-Barre. Appellant arrived at the party in the vicinity of 9:00-9:30 p.m., accompanied by two of the victims, Dorothy Lyons and Regina Clemens, each appellant's girlfriend. Also present at the party was another victim, Susan Yuhas, Mrs. Clemens' sister and also a girlfriend of

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[1] In addition to the twelve sentences of death, which were made "consecutive," appellant received consecutive sentences of imprisonment of ten to twenty years on the conviction for murder of the third degree, five to ten years on the conviction for attempted murder, and ten to twenty years on the conviction for robbery. The remaining convictions were deemed to have merged for sentencing purposes.

[2] This Court has direct appellate jurisdiction over such appeals. 42 Pa.C.S.A. §§ 722(4) and 9711(h)(1); Pa.R.A.P.Rule 702(b).

appellant. While at the party appellant drank some beer, played darts and conversed with numerous guests. Shortly after 9:30 p.m., appellant exchanged "T-shirts" with Sharon Gomb, as each admired or joked about the sayings printed on each other's shirt. Appellant's T-shirt read: "Kill Them All And Let God Sort It Out."[3] Appellant's companions, Ms. Lyons and Ms. Clemens, appeared to become upset with this exchange of shirts. Numerous guests and hosts at the party observed appellant drink some beer, but testified that his speech and movements were "normal" and coordinated and that he did not appear to be intoxicated.

Appellant and Regina Clemens left the party in the vicinity of 10:30 p.m. Between 12:00-1:00 a.m. on September 25, 1982, appellant called the Galbraith house and spoke with Dorothy Lyons. After she hung up the phone, she was very upset and crying, and she asked her nephew, David Galbraith, to get appellant's rifle for her. The rifle, a Colt AR-15, had been kept at the Galbraith house for several weeks. Ms. Lyons took the rifle, which was established by ballistics and other evidence as the murder weapon, and left the party after 1:00 a.m. in a car, accompanied by Susan Yuhas.

Kenneth Scott knew appellant and he testified that he saw him in the parking lot of the Sherman Hills Apartments at approximately 1:15 a.m. Appellant was carrying a garbage bag containing several small boxes. Ms. Lyons

[3] Ms. Gomb, who changed her shirt in a separate room with a companion actually exchanging the shirts, was wearing a shirt which read: "I Have A Drinking Problem – I Can't Get Enough."

had an apartment in the Sherman Hills Apartments in Wilkes-Barre and had stored boxes of ammunition there for appellant. (Small boxes of ammunition were found in the house where appellant eventually surrendered to police.) When Mr. Scott called to appellant and walked toward him, appellant told Mr. Scott that he ought to be careful yelling at people like that, he could get himself shot. The two spoke briefly and appellant seemed to be upset, although his speech was understandable and "normal," as was his walking.

At approximately 2:00 a.m., a group of four teenagers had left a friend's house on Schoolhouse Lane in Wilkes-Barre and were walking to their car when they heard a series of gunshots which seemed to be coming from 28 Schoolhouse Lane (appellant's home). The four were Raymond Hall, James Olson, Tommy Demellier and Molly McBride. At this time, appellant came out from the back of the house walking toward the group when Raymond Hall, recognizing appellant, stated "I know you." Appellant responded "Yeah, you're not going to live to tell anybody about this," and he aimed the AR-15 at Mr. Hall and shot him fatally. He then turned toward James Olson and shot him. Mr. Olson, although seriously wounded, survived to testify at trial. Thomas Demellier knocked Ms. McBride to the ground, seeking cover. Appellant, holding the rifle, dressed in green army fatigues with an ammunition bandolier around his chest and shoulders, backed away from them.

Later that morning, eight women and children were found shot to death at appellant's home at 28 Schoolhouse Lane. Most had been shot through the head at close range. The dead were: Susan Yuhas (age: twenty-three), and her two children to appellant, Bowendy Banks (age: four) and

Mauritania Banks (age: one) who resided with appellant; Dorothy Lyons (age: twenty-nine), and her two children, Foraroude Banks (age: one) and Nancy Lyons (not appellant's daughter; age: eleven) who sometimes resided with appellant; Regina Clemens (age: twenty-nine) and her daughter to appellant, Montanzima Banks (age: six), who had resided at 28 Schoolhouse Lane until about two weeks before the shooting.

Joseph Yencha had been drinking at a nearby lounge, the Cabaret, until about 2:10 a.m. on September 25, 1982. He was seated in his car when appellant walked up to him, pointed the rifle at his head, and told him to "move over or I'll blow your f---ing head off." Mr. Yencha moved over, appellant got behind the wheel and he told Mr. Yencha to be quiet, he didn't want any more trouble because he had just "killed his two children." Appellant asked Mr. Yencha if he wanted to get out, then he stopped the car, allowed him to get out, and told him that he would leave the car where it could be found. The car was found later that day, with an unopened bottle of gin and a bullet cartridge in the car.

At 2:30 a.m., shots were heard at the Heather Highlands Trailer Park in nearby Jenkins Township. Residents of the trailer park called the police when they heard the shots and then a male voice shouting "That's what you get for f---ing with me. You f--- with me some more, I'll come back and kill the rest of you." When police officers arrived, they found Angelo Vital and Keith Mazzillo, alive and unharmed, outside the Mazzillo trailer. They also found the bodies of Sharon Mazzillo (age: twenty-four), a former girlfriend of appellant's, and their son, Kissmayu Banks (age: five), as well as Sharon's mother, Alice Mazzillo (age: forty-seven) and Scott Mazzillo (age: seven), Sharon's

nephew. Angelo Vital and his brother, Keith Mazzillo, Alice Mazzillo's sons, witnessed the horrifying events at the trailer, and they testified at trial.

Angelo Vital, ten years of age at the time of trial, testified that appellant came into the trailer and said "I shot some of my family, now I'm going to shoot some of yours." Appellant then shot Kissmayu who had been asleep on the couch. Sharon and Alice Mazzillo tried to push appellant out of the trailer, and Alice then went into the back room to use the telephone, with Angelo following his mother. Angelo heard another shot and looked out to see appellant chasing Scott Mazzillo, saying "You called my son a nigger." Appellant then shot Scott Mazzillo, kicked him and hit him with the rifle. Appellant turned and fired one shot at Alice Mazzillo as she tried to call the police, striking her in the face and killing her, then left, telling Angelo "I'll get you next time."

Keith Mazzillo, thirteen years of age at the time of trial, testified to the same effect. He heard appellant state "I heard you call my son a little nigger," and saw him choke, kick, hit and shoot Scott Mazzillo. He did not see appellant shoot the others. Sharon Mazzillo's body was found outside the trailer, where Keith had heard her arguing with appellant. Both Angelo Vital and Keith Mazzillo identified the AR-15, introduced into evidence at trial, as the weapon appellant used that morning.

At about 6:00 a.m., appellant arrived at his mother's house. His mother, Mrs. Mary Yelland, told the police that appellant stated "I killed them. I killed them all." Mrs. Yelland called appellant's house and spoke with a police officer. Appellant got on the telephone with Luzerne County Detective James Zardecki and asked how his kids

were. Detective Zardecki told him the children were hospitalized and seriously hurt, but appellant responded "You're lying. I killed them. I know they're dead . . . . Just tell me I killed them and I'll kill myself." After a minute or two of Detective Zardecki trying to convince appellant that his children were alive, and repeated statements by appellant that he knew they were dead, the line went dead. Detective Zardecki had no trouble understanding appellant who was responsive and spoke in a "normal" tone.

After this call, appellant told his mother to drive him to his friend's (Jacob Whitt's) house at 24 Monroe Street in Wilkes-Barre. On their way there, their vehicle was involved in a traffic accident. Appellant stated he was going to kill the other driver, but his mother convinced him not to, and the two drove away. When they arrived at Monroe Street, appellant went into the house, telling his mother he would never see her again. He then went inside and prepared himself for a siege.

Mrs. Yelland returned to her home where, a short time later, police officers came believing appellant was there. Mrs. Yelland informed them appellant was at 24 Monroe Street. Police officers then surrounded the house by about 7:00 a.m.

Between 7:30-8:00 a.m., Mrs. Geraldine Whitt called her son Jacob's home to talk with him, and appellant answered the telephone. They recognized each other's voices. Mrs. Whitt asked appellant what he was doing there, and he replied "I killed them all. They're all dead. I killed my whole family . . . . I barricaded myself in Jake's house and I came here to die." He also told Mrs. Whitt that it was too late to pray for him now, "but you can pray for

my soul." Mrs. Whitt had no trouble understanding appellant, who sounded calm and coherent.

Telephone communications were established by police officers with appellant. Various civilians and police officers spoke with appellant, trying to convince him that his children were alive and in need of blood, and that he should therefore give himself up. Police arranged to have a radio broadcast played to corroborate the ruse that appellant's children were alive. While he persisted to tell people that they were lying because he knew he killed his children who he did not want "to grow up in a white racist world," eventually he gave himself up, at 11:15 a.m., after speaking with Mr. Robert Brunson, an acquaintance of appellant. Appellant told Officer Donald Smith he would have to break the window to hand the gun out, which he did, and he asked the officer not to shoot him. After handing out the AR-15 with a "banana" ammunition clip attached and two additional clips, he came out of the house with his hands above his head, as he had been instructed. Neither Officer Smith nor Mr. Brunson, nor any of those who spoke with appellant that morning, had any difficulty understanding appellant, who was calm and responsive to questions and instructions. Most of the witnesses testified that appellant did not appear to be intoxicated, although there was some evidence that he had an odor of alcohol about him.

Appellant was taken to the Wilkes-Barre police station and advised of his constitutional rights by Detective Patrick Curly. He told police officers there that he knew they had been lying to him about the children being alive. He further stated to Detective William Maguire that "he wished he was dead, because he stated that the State was going to kill him, anyway, in the electric chair."

The Commonwealth also introduced evidence from various witnesses to show appellant's apparent motive for his rampage. This evidence supported the inference that appellant was disturbed about losing control over his extended family. Regina Clemens had moved out of appellant's residence about two weeks before the shooting spree, and was planning to move to Florida to get away from appellant. In the week before the murders, appellant was seen slapping and hitting Susan Yuhas, Regina Clemens' sister, stating "You're just like your sister Gina. You're going to leave just like her."

Appellant's mental condition at the time of the shootings was a major issue at trial, and the expert opinions of the psychiatric witnesses for the defense were diametrically opposed to the opinions of the Commonwealth's expert psychiatric witnesses. Defense counsel, the Luzerne County Public Defender and two assistant public defenders, presented numerous lay witnesses and three psychiatrists in an attempt to establish that appellant was legally insane under the *M'Naghten* rule, which despite repeated challenges remains the test for determining legal sanity and criminal responsibility in this Commonwealth. *Commonwealth v. Oblek,* 496 Pa. 519, 437 A.2d 1162 (1981). Under *M'Naghten,* a defendant is legally insane, and absolved of criminal responsibility, if "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know what he was doing was wrong." *Commonwealth v. Roberts,* 496 Pa. 428, 434, 437 A.2d 948 (1981), quoting *The Queen v. M'Naghten,* 10 Cl. & Fin. 200, 8 Eng.Rep. 718 (1843). Or as it is sometimes stated in the streamlined version, "an

accused is criminally responsible [and not legally insane] unless at the time of committing the act, due to a defect of reason or disease of the mind, the accused (1) did not know the nature and quality of the act or (2) did not know that the act was wrong." *Commonwealth v. Tempest,* 496 Pa. 436, 440, 437 A.2d 952 (1981) (citations omitted).

In addition to the insanity defense, counsel also presented the defense of diminished capacity, *Commonwealth v. Walzack,* 468 Pa. 210, 360 A.2d 914 (1976), attempting to reduce appellant's degree of guilt by showing that, because of his mental condition and intoxication due to consumption of alcohol (beer and gin) and pills (Dilantin), he was unable to form the specific intent to commit murder of the first degree. There was evidence that appellant drank beer at the Galbraith's party, and several witnesses detected an odor of alcohol about him the following morning. Additionally, appellant had told lay witnesses and psychiatrists that he had been drinking gin for several days prior to and including September 25, 1982 and that, after he left the birthday party, he went home and took some pills (Dilantin) which he washed down with gin, and then passed out.

As to the insanity defense, lay and psychiatric witnesses for the defense presented a profile of a disturbed and paranoid man. Appellant, a prison guard at the state correctional institution in Camp Hill, was forty years of age at the time of the murders. He grew up taunted and tormented by both blacks and whites as he was the son of a black father and a white mother. Appellant was constantly called "half-breed," "zebra," and other derogatory names, as was his brother. Through the years, he developed a persecution complex and became obsessed with the

paranoid delusion that there were soon to be international race wars and uprisings. In fact, he had written a chapter of a novel, featuring himself and his sons, dealing with survival in the aftermath of a race war. He prepared himself for the race wars by purchasing weapons, planting food along escape trails in the woods and reading the standard "survivalist" fare such as *Soldier of Fortune* magazine. At various times, he had spoken of killing himself, of killing people at a shopping mall, and of killing his children rather than see them brought up as he had been in a racist society.

The defense called three psychiatrists as experts. All three agreed, essentially, that appellant had been, before, during and after the murders, suffering from a severe mental defect, paranoid psychosis with paranoid delusions. All also agreed that, when dealing in the area of appellant's paranoid delusions concerning racism and race wars, appellant was completely obsessed and singularly focused, but that all other aspects of his personality, including his cognitive functioning, were "normal" and intact. (Appellant had a high I.Q., over 120, and was described as being in the upper five percent of the population based on intelligence.)

Dr. Anthony J. Turchetti, a forensic psychiatrist who was appointed by the lower court in October, 1982, to examine and evaluate appellant, stated that in his opinion, appellant was, on September 25, 1982 (the date of the killings), actively suffering from psychosis paranoia which affected his thoughts, discretion and judgment and

"because of this, I don't think he was capable of distinguishing right from wrong at that time."[4] Dr. DeWitt Weatherly and Dr. Michael K. Spodak also testified as expert witnesses for the defense. Drs. Weatherly and Spodak, both forensic psychiatrists licensed to practice their specialty in Maryland but not in Pennsylvania,[5] each testified that, in his opinion, appellant did not, as a result of his paranoid psychosis, understand the nature and quality of his criminal acts on September 25, 1982 and was unable to distinguish between right and wrong with respect to those acts.

Appellant also took the stand himself, against the advice of counsel, to offer a "partial" defense of a conspiracy against him. This theory will be discussed more fully in discussing appellant's competency to stand trial, but essentially was that appellant was the victim of a racist conspiracy involving, among others, police officers, the Mayor of Wilkes-Barre, the District Attorney's office and the judge. Appellant admitted shooting most of the victims, but claimed that Detective Curly shot and killed two

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[4] Dr. Turchetti had examined appellant on eight occasions in October, 1982 and once in February, 1983. His opinion was based "almost solely" on what appellant told him during these examinations. Dr. Turchetti's opinion was seriously discredited by the prosecutor on cross-examination.

[5] Neither Dr. Weatherly nor Dr. Spodak had previously been an expert witness in a case dealing with insanity under the Pennsylvania M'Naghten standards. Maryland uses, according to these psychiatrists, the more "liberal" American Law Institute standards, namely that an actor is not criminally responsible for his acts where at the time of committing the act, as a result of mental disease or defect, he lacks the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

of the victims and that Detective Curly and others had moved the corpses, altered their features, "doctored" their wounds and concealed or destroyed evidence, all as a part of a racist conspiracy.

In rebuttal, the Commonwealth introduced lay and expert testimony to establish appellant's sanity. Dr. Park E. Dietz and Dr. Robert L. Sadoff, both of whom are forensic psychiatrists licensed to practice their speciality in Pennsylvania,[6] testified for the Commonwealth. Both psychiatrists reviewed previous psychiatric evaluations of appellant, observed him in court at trial and on previous occasions, examined appellant, reviewed numerous documents and letters, and examined the extensive testimony of witnesses and statements of people who had been in contact with appellant on September 24-25, 1982.

While Drs. Dietz and Sadoff basically agreed with the diagnosis of the defense psychiatrists that appellant suffered from a serious mental defect, paranoia psychosis, which did not otherwise impair his personality, intelligence and cognitive functioning, they did not agree with their expert opinions. Each testified that, in his opinion, appellant was able to know and understand the nature and quality of his acts, to distinguish between right and wrong, and to form the specific intent to murder. Each doctor also seriously questioned the bases for the defense psychiatrists' opposite conclusions. Significant factors in

[6] Dr. Turchetti testified on cross-examination that Dr. Sadoff, the only expert who was board certified as a forensic psychiatrist by the American Board of Forensic Psychiatrists and a frequent publisher of articles and books in the field, was one of the leading psychiatrists in the country.

forming their opinion that appellant knew the nature and quality of his acts and knew his acts were wrong included appellant's behavior and repeated acknowledgements that he knew he had killed his family and children, his threats to kill at least several of the victims before he actually shot them, his threats to return to kill Angelo Vital and Keith Mazzillo, and many other indications that he knew and understood that what he did was wrong.[7] There were also numerous indications of premeditation and planning, including appellant's telephone call to Dorothy Lyons to get the AR-15 for him, and his driving to the Sherman Hills Apartments to get the ammunition.

The jury rejected appellant's defenses and, after deliberating for about five hours, with one request for clarification as to the degrees of homicide, returned its verdicts on June 21, 1983, finding appellant guilty of murder of the first degree on twelve counts, murder of the third degree for the killing of Raymond Hall, attempted murder of James Olson, and on the remaining counts of assault, robbery and theft.

The following day, a sentencing proceeding was conducted before the same jury, pursuant to the Sentencing Code. 42 Pa.C.S.A. § 9711(a). The Commonwealth sought the death penalty on each conviction for murder of the first degree on three aggravating circumstances under section 9711(d), namely that appellant knowingly created a grave risk of death to other persons (d)(7), that appellant

[7] These indications included his belief that he would probably get the electric chair for his deeds, his barricading himself at 24 Monroe Street and his telling Mrs. Whitt to "pray for his soul."

had a significant history of felony convictions involving violence (d)(8), and that appellant had been convicted of another offense committed at the time of the offenses at issue for which a sentence of life imprisonment or death was imposable (d)(10). Appellant presented three mitigating circumstances under section 9711(e), namely that appellant was under the influence of extreme mental or emotional disturbance (e)(2), the capacity of appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (e)(3), and "any other evidence of mitigation concerning the character and record of defendant and the circumstances of his offense" (e)(8). After deliberating for almost six hours, the jury returned twelve sentences of death based on its finding of one aggravating circumstance ((d)(10)-other offenses for which death sentence was imposable) which outweighed the one mitigating circumstance it found ((e)(2)-extreme mental or emotional disturbance). 42 Pa.C.S.A. § 9711(c)(iv).

From the foregoing, we have no difficulty in finding the evidence sufficient to sustain appellant's convictions beyond a reasonable doubt.[8] As we have seen, there was overwhelming evidence that appellant premeditated, planned and specifically intended to kill his family

[8] As in all appeals involving a judgment of sentence of death, this Court will review the record to determine whether the evidence is sufficient to sustain the conviction(s) for murder of the first degree, even though the appellant has not specifically challenged the sufficiency of the evidence. *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 26 n. 3, 454 A.2d 937 (1982), *cert. denied,* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), *reh'g denied,* 463 U.S. 1236, 104 S.Ct. 31, 77 L.Ed.2d 1452 (1983).

members.[9] And, there was abundant evidence, both from lay witnesses and the Commonwealth's expert and well-qualified psychiatric witnesses, to support the jury's finding that appellant was legally sane and criminally responsible for his acts of September 25, 1982 under *M'Naghten,* and that he possessed the capacity to form the specific intent to kill. *See Commonwealth v. Zettlemoyer, supra* note 8 at 500 Pa. 27-39 (evidence that appellant Zettlemoyer had a "schizoid personality with paranoid features" was insufficient to establish defense of diminished capacity); *Commonwealth v. Weinstein,* 499 Pa. 106, 114, 451 A.2d 1344, 1347 (1982) (psychiatric testimony under *Walzack*/diminished capacity is irrelevant unless "it speaks to mental disorders affecting the cognitive functions [of deliberation and premeditation] necessary to formulate a specific intent"); *Commonwealth v. Tempest, supra* (although mother, who drowned her son and then went downstairs to watch game shows on television until her husband came home was mentally ill, she was nevertheless legally sane under *M'Naghten,* as evidenced by her statements made during and after the drowning); *Commonwealth v. Zlatovich,* 440 Pa. 388, 269 A.2d 469 (1970) (mother who shot her four children rather than see her children taken from her by her husband was legally sane under *M'Naghten;* lay testimony alone was sufficient to rebut the opinion of three defense psychiatrists that mother was insane).

We turn now to appellant's specific assignments of error. Appellant first and principal claim is that the lower

[9] "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa.C.S.A. § 2502(a).

court erred in finding him to be competent to stand trial. On February 28, 1983, pursuant to defense counsels' application under section 402-403 of the Mental Health Procedures Act of 1976, Act of July 9, 1976, P.L. 817, No. 143, 50 P.S. §§ 7402-7403 (supp. 1986), a preliminary competency hearing was held at which the court scheduled a full evidentiary hearing. The reason for defense counsels' concern over appellant's competency was his stubborn insistence on pursuing his "conspiracy" theory, i.e., that the police officers, the Mayor of Wilkes-Barre, the District Attorney's office and perhaps the court were conspiring against him in concealing and altering evidence, shooting some of the victims, rearranging some of the corpses and covering up some of their wounds, and obstructing his attempts to expose the "conspiracy." He viewed his trial as a means of "taking the mask off the devil."

The first pre-trial competency hearing was held on March 14, 1983, at which much lay testimony was introduced, as well as the expert opinions of Dr. Michael Spodak (for the defense) and Dr. Robert Sadoff (for the Commonwealth). The lower court allowed broad latitude to both sides to explore appellant's competency. Again, the psychiatric opinions were diametrically opposed. Dr. Spodak testified that, while appellant's cognitive functions and intelligence were reasonably unimpaired, his paranoid delusions of the conspiracy were so strong that he would be substantially unable to understand the nature and object of his proceedings or to participate and assist in his defense. (The Mental Health Act provides that a person shall be deemed incompetent to stand trial if he is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense . . . ." 50 P.S. § 7402(a)) Dr. Sadoff, on the other

hand, testified unequivocally that appellant was able to follow the advice of counsel and to participate and assist in the defense, although he might choose not to. He also testified that, in his opinion, appellant fully understood the nature and object of the pending criminal proceedings as a trial to determine his guilt or innocence and sentence if found guilty, even though he choose to use the proceedings to advance his own agenda and to expose the "conspiracy" to the public. On March 18, 1983, the court issued an order declaring appellant was "not substantially unable to understand the nature or object of the proceedings against him, or to participate and assist in his defense," and he directed appellant to stand trial.

At the request of defense counsel, a second pre-trial competency hearing was held on May 6, 1983, with Dr. Sadoff again testifying for the Commonwealth and Dr. DeWitt Weatherly for the defense. Dr. Weatherly stated that, in his opinion, because of appellant's obsessive and paranoid preoccupation with this perceived conspiracy, he would be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense. On cross-examination, however, Dr. Weatherly conceded that appellant did not have a loss of cognitive function, that he knew he was in a court of law for a competency hearing, that he was charged with thirteen counts of homicide and other offenses for which the penalty could be execution, that he knew what the functions of the various "players" in the criminal judicial system were, that he understood the insanity defense and that he would not be executed if he was found not guilty by reason of insanity, and that he knew he could cooperate with counsel in presenting that defense or he could refuse to cooperate. The crux of Dr. Weatherly's and defense

counsels' position that appellant was incompetent to stand trial was that, despite appellant's cognitive awareness and intellectual capacity, he wanted to use the criminal trial to "go through some sort of sensational, explosive proceeding to reveal his story and . . . wake up the community, arouse the community, precipitate a race war, revolution." In summary, Dr. Sadoff testified for the Commonwealth that his opinion had not changed, and that appellant remained competent to stand trial despite his obsession with a conspiracy and his choice to use the trial as a forum for his personal agenda.

Appellant testified at this proceeding, and verified his obsessive, conspiracy delusion as well as his cognitive abilities to converse, respond to questions appropriately and to understand the nature and object of the proceedings. (For example, when asked by the District Attorney on cross-examination whether he shot Raymond Hall, appellant refused to answer the question "under the Fifth Amendment, whatever that is.") From the bench, the court again declared appellant competent to stand trial.

On May 13, 1983, there was a hearing on the Commonwealth's petition to order a psychiatric evaluation of appellant, with appellant present. Appellant's responsiveness to the court's questions and his overall alertness was apparent at this proceeding.[10] He asked pertinent ques-

[10] For example, the following exchange took place:

DEFENDANT: One thing I'd like to say, sir, if I could?

THE COURT: Sure.

DEFENDANT: I'm willing to cooperate fully with the District Attorney and Dr. Sadoff [in allowing a psychiatric examination], but I would be more inclined to do so after this

(Continued on following page)

tions about the scope of the privilege against self-incrimination, and about the timing of a petition to exhume the bodies of the victims that his attorneys had filed at his insistence (against their judgment). Appellant believed that exhumation would verify his conspiracy theory and show that the victims' corpses had been tampered with before photographs had been taken of the crime scene.

On May 20, 1983, defense counsel filed another petition seeking a competency examination, but did not offer any additional evidence of incompetency. Counsel also filed a petition to withdraw as counsel. The court

business with the – what do you call it? Now, I thoroughly understand everything you said, but I was hoping that perhaps it could be maybe postponed until after we get this business with the exhumation settled, once and for all.

THE COURT: Well, Mr. Banks, I don't control the exhumation application.

DEFENDANT: I understand.

THE COURT: That's in the hands of another judge.

You also understand that we're leaving on Sunday, and so, while I am anxious to move things along, I certainly don't want to prejudice you in any way. That's why I've warned you and I warn you again:

Please remember – everything you say – and I'm sure your attorneys have told you this, time and time again –

DEFENDANT: I'm thoroughly aware of it, yes, sir.

THE COURT: Anything you say that is in any way incriminating, I suggest to you that in your particular position, anything you say may be incriminating.

DEFENDANT: That don't matter to me. All I want to do is get it over with. As far as I'm concerned, you know, I'm dead, anyway.

Notes of Testimony (N.T.), May 13, 1983 at 13-14.

denied these petitions, the gravaman of which was described in Judge Toole's excellent opinion in support of denial of post-verdict motions, as follows:

> Essentially, counsel contend that because of Banks' contention that the trial was part of a conspiracy, because he would not agree to a defense of insanity, because he was not consistent, because he did not heed the advice of his counsel or follow their proposed strategy, and because he was not always rational as they deemed or desired it, that this was clear evidence that he was incompetent to stand trial.
>
> Slip op. at 13.

Defense counsel also made three motions for a competency determination, during trial, all of which were denied summarily by the lower court. Two of these requests were predicated on a diagnosis by the Commonwealth's expert witness, Dr. Dietz, that appellant was paranoid and delusional, and upon counsels' belief that this condition rendered appellant incompetent to stand trial. The most vigorous request for a competency determination came prior to appellant's taking the stand against the advice of counsel. A lengthy colloquy preceded appellant's testifying during which he demonstrated his understanding of the proceedings, that he did not have to testify, of the effect that his testifying would have on his right to remain silent and that he would be bound by the same rules of evidence as would anyone else. N.T. June 16, 1983 at 1638-47.

What most concerned counsel was their belief that appellant intended to introduce photographs of some of the corpses, which he believed would prove his conspiracy theory to the jury. Obviously, counsel was concerned about the prejudicial effect that introduction of such photographs

might have on the jury, and about the lik[e]lihood that the Commonwealth would introduce additional photographs of the corpses to disprove appellant's theory. (In fact, this is what occurred at trial, with a comprehensive and appropriate cautionary instruction given by the court at the time the photographs were introduced. *Id.*)

Prior to trial, on May 9, 1983, a suppression hearing was held at which the court ruled that the Commonwealth would not be permitted to introduce any photographs of the corpses. At this hearing, appellant informed the court that he wished to use some of the photographs to prove that the corpses had been tampered with. The court advised appellant that introduction of the photographs might be prejudicial and that if he did introduce some of the photographs at trial, the Commonwealth might then be able to introduce additional photographs. Appellant indicated that he understood, but that he planned to do so anyway.

Appellant now claims that the lower court erred in ruling that he was competent to stand trial. We do not agree.

As noted, a person is incompetent to stand trial where he is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense." 50 P.S. § 7402(a). Due process considerations also come into play when the competency of the accused is in question. As this Court stated in *Commonwealth v. Martinez,* 498 Pa. 387, 391, 446 A.2d 899, 901 (1982):

It is well established that:

> "the test to be applied in determining the legal sufficiency of [a defendant's] mental capacity to stand trial . . . is . . . his ability to comprehend his position as one accused of murder and to cooperate with his counsel in making a rational defense. *See Commonwealth v. Moon* [383 Pa. 18, 117 A.2d 96 (1955)], and *Commonwealth ex rel. Hilberry v. Maroney* [417 Pa. 534, 544, 207 A.2d 794, 799 (1965)]. Or stated another way, did he have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and have a rational as well as factual understanding of the proceedings against him. *See Dusky v. United States,* 362 U.S. 402 [80 S.Ct. 788, 4 L.Ed.2d 824] (1960). Otherwise, the proceedings would lack due process: *Bishop v. United States,* 350 U.S. 961 [76 S.Ct. 440, 100 L.Ed. 835] (1956)."
> *Commonwealth ex rel. Hilberry v. Maroney,* 424 Pa. 493, 495, 227 A.2d 159, 160 (1967).

Equally well established is that the person asserting incompetency has the burden of proving incompetency by clear and convincing evidence, 50 P.S. § 7403(a),[11] and that the determination of competency rests in the sound discretion of the trial judge which will not be disturbed absent a clear abuse of discretion. *Commonwealth v. Martinez, supra; Commonwealth v. Ware,* 459 Pa. 334, 356, 329 A.2d 258, 269 (1974); *Commonwealth v. Hart,* 501 Pa. 174, 177,

[11] Prior to passage of the Mental Health Act of 1976, the burden was upon the party asserting incompetency to prove it by a preponderance of the evidence. *Commonwealth v. Kennedy,* 451 Pa. 483, 487, 305 A.2d 890, 892 (1973).

460 A.2d 745 (1983); *Commonwealth v. Davis,* 459 Pa. 575, 330 A.2d 847 (1975).

As we have seen in the preceding recitation of facts, the lower court gave broad latitude and every opportunity to defense counsel to establish appellant's incompetency to stand trial. In ruling that appellant was competent, the court had ample evidence, from lay witnesses and from expert psychiatric witnesses, upon which to base its determination. Moreover, the court also had many opportunities to personally observe appellant not only at his competency hearings and at trial, but also during hearings and arguments on several pre-trial motions.

The court stated in its opinion denying appellant's post-trial motions:

> As the trial Judge, I would also note at this time I had the opportunity to observe Banks' demeanor and participation during the course of the proceedings, and I found nothing to indicate or cast any doubt on his competency to stand trial. His behavior, demeanor and presentations throughout these proceedings corroborated rather than contradicted the finding of competency.

Slip op. at 15, n. 2. At one point during trial, appellant decided to personally cross-examine Coroner Joseph M. Shaver and to use the photographs of some of the corpses in conducting his cross-examination. Prior to conducting the colloquy with appellant preceding appellant's testimony in his own defense, the court responded to defense counsels' concerns for appellant's competency, stating: "Again, the Court is satisfied, and I'm more satisfied as I watch him every day in court, of his competency . . . .

Even his demeanor, his questioning, in my opinion, establish competency again." N.T., June 8, 1983 at 454. The court's personal assessment and determination of appellant's competency were fully supported by the record, and it was well within the court's discretion, therefore, to rule that appellant had not met his burden of demonstrating, by clear and convincing evidence, that he was substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense.[12]

Nevertheless, appellate counsel would have us reverse the lower court's determination of competency because appellant "advanced an irrational and absurd defense" which was "diametrically opposite to the insanity defense raised by defense counsel," because in "no instance could the Defendant follow counsel's advice on any of the substantive issues; i.e., Fifth Amendment rights, insanity, specific intent, diminished capacity, and the introduction of prejudicial photos . . . ," and because he did not understand the nature of the proceedings against him but, rather, viewed them as a "means to uncover the conspiracy against him – to unmask the devil." Brief for Appellant at 31-33. We disagree.

As the lower court correctly stated:

> Lack of cooperation and the failure to heed counsel's advice and/or the failure to agree with

[12] Indeed, there was adequate support on the record for the trial court's determination of competency even under the pre-Mental Health Act of 1976 standard of "preponderance of the evidence." *See* note 11, *supra*.

> counsel's strategy are certainly not to be equated with and do not establish legal incompetency. *The issue is the Defendant's ability to cooperate and not whether he is actually cooperating. Indeed, as the trial Judge noted, there is a factual and legal distinction between inability to assist and being unwilling to assist.* Defense counsel also contend that Banks' belief that a conspiracy existed against him and that he was going to "unmask the devil" establishes his incompetency. It may well be that Banks actually believed that such a conspiracy existed and that the trial was necessary to establish that fact. On the other hand, Banks may have feigned such a belief in hopes of actually promoting the defense of insanity being raised by his counsel which, on the other hand, he indicated he did not desire to assert. *Whatever Banks' intent or strategy was or whether it comported with his counsel's desires or plans – does not change the fact that he was "legally competent" to stand trial.*
>
> Slip op. at 13-14 (emphasis added).

Appellant clearly demonstrated his *ability* to participate and assist in his defense and his understanding of the nature and object of the proceedings. While presentation of his conspiracy theory was against counsels' advice, his bizarre "defense" did not, as counsel suggests, conflict with his defense of insanity. In fact, his "conspiracy" theory and presentation at trial dovetailed quite nicely with the opinions of the expert psychiatric witnesses for the defense, who testified that appellant's obsessive and paranoid delusions about racism and race wars prevented him from understanding the nature and quality of his acts and from knowing that his acts were wrong.

Finally, while it does, indeed, appear that appellant viewed his trial as an opportunity to prove his perceived conspiracy to the jury and to the world, there is ample evidence of record to support the court's determination that appellant understood that he was on trial on thirteen counts of homicide, that he could be sentenced to death if convicted, that he would not be sentenced to death if found not guilty by reason of insanity, that he understood the role and functions of the prosecutors, defense attorneys and judge, and that he was able to assist and participate in his defense even though he chose not to cooperate with counsel nor to heed their advice.

For the foregoing reasons, we hold that the lower court did not err in its determination that appellant was competent to stand trial.

Appellant next argues that the court erred in its instructions to the jury on sanity. Appellant's brief states:

> Consideration being given to the inadequacies of *M'Naghten* in Pennsylvania, [the trial] Court produced its own definition of insanity by (1) recognizing that to be insane, the Defendant must be 'completely or totally unable to understand the nature and quality of his act or completely or totally unable to distinguish between right and wrong . . . .' [N.T., Trial Volume VI, p. 2223]; (2) that knowledge of the nature and quality of the act relates merely to a cognitive awareness of the physical act and its consequences; [N.T., Trial Volume VI, pp. 2224-25]; and (3) that 'wrong' means 'legally or morally' with morality reflecting 'societal standards and not those of a particular individual.' [N.T., Trial Volume VI, p. 2225]. In defining *M'Naghten* with consideration being given to the Commonwealth's burden of proof, the Court charged as follows:

> '[I]n view of what I have said regarding the legal test of insanity and the Commonwealth's burden of proof, you cannot find the Defendant guilty unless you are satisfied beyond a reasonable doubt that at the time of the acts involved, that is, the killings, the attempted murder and the robbery, either the Defendant had no mental disease or defect, or, if he did have a mental disease or defect, that he was not, as a result of such disease or defect, incapable of knowing what he was doing and of judging that it was wrong to do so. That is the test.' [N.T., Trial Volume VI, p. 2226].
>
> An exception to the Court's charge on insanity was taken by Defense Counsel. [N.T., Trial Volume VI, pp. 2237-38].

Brief for Appellant at 38-39.

On appeal, the court's instructions to the jury must be viewed in their entirety and considered as a whole. *Commonwealth v. Zettlemoyer, supra* at 500 Pa. 38, 454 A.2d 937; *Commonwealth v. Tolassi,* 489 Pa. 41, 413 A.2d 1003 (1980). So viewed, we find that the court's instructions fully and adequately delineated the law in this Commonwealth as to legal insanity/criminal responsibility. (The court's entire charge to the jury on the issue of insanity is set forth *infra* as an Appendix to this opinion.)

Appellant's principle challenge to the court's instructions asserts that, under *M'Naghten,* "knowledge" of the nature and quality of the act must entail more than a "cognitive awareness that an act is being committed;"

rather, it must also encompass "a rational appreciation as well of all the social and emotional implications involved in the act and a mental capacity to measure and foresee the consequences of the violent conduct." Brief for Appellant at 37, 41. We agree with the Commonwealth that this position amounts to an indictment of the *M'Naghten* standard, and either misperceives the nature of the *M'Naghten* test or seeks to fundamentally alter it. This we shall not do. In *Commonwealth v. Tempest, supra,* we stated that the *M'Naghten* test can and does embrace those mentally disturbed in the category of those criminally responsible, 496 Pa. at 441, 437 A.2d 952, and is not intended to separate the emotionally disturbed from the emotionally healthy. *Commonwealth v. Demmitt,* 456 Pa. 475, 481, 321 A.2d 627 (1974). And as we said explicitly in *Commonwealth v. Neill,* 362 Pa. 507, 514, 67 A.2d 276, 280 (1949):

> Certainly neither social maladjustment, nor lack of self-control, nor impulsiveness, nor psychoneurosis, nor emotional instability, nor chronic malaria, nor all of such conditions combined, constitute insanity within the criminal conception of that term.

For the Commonwealth to meet its burden of demonstrating that a defendant is legally sane,[13] it most certainly does not have to demonstrate that he or she has a "rational appreciation as well of all the social and emotional

[13] Where there is sufficient evidence to raise the issue of sanity, the burden of proof is on the Commonwealth to establish the defendant's sanity beyond a reasonable doubt. *Commonwealth v. Scarborough,* 491 Pa. 300, 305, 421 A.2d 147 (1980).

implications" or the ability "to measure and foresee the consequences" of the act. As this Court stated long ago in adopting the *M'Naghten* test in this Commonwealth, "to the eye of reason, every murderer may seem a madman, but in the eye of the law he is still responsible . . . . [T]o constitute a sufficient defense on this ground there must be an entire destruction of freedom of the will . . . ." *Commonwealth v. Mosler,* 4 Pa. 264, 268 (1849). Contrary to appellant's position, legal sanity is *not* demonstrated by a murderer's appreciation of the social and emotional implications of the killing nor by his ability to measure and foresee all of the consequences of that act, but rather is demonstrated by the murderer's knowledge that he or she has killed and the knowledge that it was wrong. *Commonwealth v. Tempest, supra; Commonwealth v. Zlatovich, supra; Commonwealth v. Demmitt, supra; Commonwealth v. Metzler,* 499 Pa. 122, 123-24, 451 A.2d 1352 (1982).

Appellant challenges the portion of the court's charge which instructs the jury that "you cannot find the Defendant guilty unless you are satisfied beyond a reasonable doubt that . . . either the Defendant had no mental disease or defect, or, if he did . . . that he was *not . . . incapable of knowing* what he was doing and of judging that it was wrong to do so." Appellant contends that charging the jury that the Commonwealth must prove he was "not incapable of knowing" was erroneous, that the proper phraseology under *M'Naghten* is that the Commonwealth must prove the actor was "able to know," and that this "variation" on *M'Naghten* "ingeniously shifted the burden to the defense to prove insanity" as the "Defendant must be 'able to understand' and not, 'not unable.'" Brief for Appellant at 39-40. We perceive little, if any, significance to the court's

use of the phrase "not incapable" as opposed to "able," and we are satisfied that the court's comprehensive instructions to the jury, read in their entirety (*see* Appendix), adequately and accurately conveyed to the jury the law in this Commonwealth regarding legal insanity/criminal responsibility under *M'Naghten,* notwithstanding appellant's quibbles with certain isolated portions of that charge.

Before we leave the subject of appellant's mental condition, we wish to make it clear that we are aware that appellant suffers and has suffered from a mental defect that contributed to his bizarre behavior both in the courtroom and on September 25, 1982, when thirteen innocent persons were murdered by his hand. His behavior was inexplicable, and his thought-processes remain difficult to comprehend. However, the incomprehensibility, the bizarreness of someone's behavior, is not, nor can it be, determinitive of his legal sanity or competency to stand trial. A hallmark of society is holding its members accountable for their conduct. In rejecting appellant Weinstein's request that we recognize irresistable impulses as diminishing an actor's ability to form the specific intent to kill, we stated in *Commonwealth v. Weinstein, supra* at 499 Pa. 116, 451 A.2d 1344:

> The law, in its effort to shape a rational social policy, grounded in the broadly shared assumptions of the individuals who make up society, cannot admit that acts an individual carefully plans and carries out to advance his own desire, when he knows those acts will result in the death of another human being, will not be punished simply because of the intensity or strangeness of that desire. Such an admission proceeds imperceptibly to the absurd result that the more

> strange and brutal the act the more likely the actor is to be relieved of its criminal consequences. Along the psychoanalytic continum the outrageous proves the innocence. In an oddly circular fashion the act establishes its cause as mental illness and the mental illness determines the act. Such analysis may be medically useful. It is not legally useful.

Appellant next contends that the court committed prejudicial error when it permitted the Commonwealth to introduce highly inflammatory photographs of the victims. As previously discussed, the court initially ruled at a suppression hearing on May 13, 1983, that the Commonwealth would not be permitted to introduce photographs of the murder victims. At this hearing, appellant explained to the court why he believed the photographs would be helpful to establish his conspiracy theory. The court cautioned appellant and advised him of the potential prejudice that could result if the photographs were introduced, and further advised him that the remaining photographs might become admissible at trial if he pursued his conspiracy theory. Appellant indicated, and the court found, that he understood the court's advice and the consequences of his tactics.

At trial, appellant did present his conspiracy defense and used some of the photographs of the victims in personally cross-examining Coroner Shavers. An extensive colloquy was conducted in which appellant was readvised of the consequences of his actions and, again, appellant demonstrated his understanding of the court's advice and of the consequences of his strategy. N.T. June 7-8, 1983, at 445-63.

In rebuttal, the Commonwealth recalled the three pathologists who had previously testified and introduced thirty-eight additional photographs of the corpses, over objection by defense counsel. The court gave a cautionary instruction to the jury concerning the photographs, explaining the limited purposes of the photographs and admonishing the jury not to "become emotional" and to "disregard any inflammatory influence that they may have upon you or that you may feel . . . ." N.T. June 18, 1983 at 1946.

Under these unusual circumstances, we see no error in admitting the photographs of the corpses to rebut appellant's defense of conspiracy. We recently stated in *Commonwealth v. Garcia,* 505 Pa. 304, 313, 479 A.2d 473 (1984):

> The admission into evidence of photographs depicting the corpse of the homicide victim or the location and scene of the crime lies within the sound discretion of the trial judge . . . . A photograph which is judged not inflammatory is admissible if "it is relevant and can assist the jury in understanding the facts." . . . A gruesome or potentially inflammatory photograph is admissible if it is of "such essential evidentiary value that [its] need clearly outweighs the likelihood of inflaming the minds and passions of the jurors." (Citations omitted.)

It is clear that the photographs of the crime victims in this case were of essential evidentiary value to refute appellant's conspiracy theory, and that the court did not err, therefore, in permitting the photographs to be introduced in rebuttal by the Commonwealth.

Appellant also asserts that the court erred in several instances in introducing evidence of his prior criminal record and of prior acts of violence which, he claims, unduly prejudiced him. It is, of course, true that evidence of prior crimes and/or acts of violence are inadmissible merely to show the defendant's propensity for violence or bad character. *Commonwealth v. Morris,* 493 Pa. 164, 175, 425 A.2d 715 (1981). However, evidence of prior crimes and violent acts may be admissible in special circumstances where it is relevant for some other legitimate purpose and not merely to show the defendant's propensity for committing crimes. *Commonwealth v. Claypool* 508 Pa. 198, 204, 495 A.2d 176 (1985).

Accordingly, the general rule prohibiting the admission of evidence of prior crimes nevertheless

> allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.

Commonwealth v. Morris, supra at 493 Pa. 175, 425 A.2d 715. This list of "special circumstances" is not exclusive, and this Court has demonstrated it will recognize additional exceptions to the general rule where the probative value of the evidence outweighs the tendency to prejudice the jury. *Commonwealth v. Claypool, supra*

(evidence of defendant's prior criminal activity is admissible where defendant makes statement about such activity in order to threaten and intimidate victim and where force or threat of force is element of crime for which defendant is being prosecuted). Such evidentiary issues are addressed to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Id.* With these principles to guide us, we review appellant's specific assignments of error.

Appellant contends that the court erred in permitting the Commonwealth to cross-examine Dr. DeWitt Weatherly regarding appellant's previous 1962 conviction and incarceration for armed robbery, assault with intent to kill and other related offenses. Dr. Weatherly testified for the defense regarding appellant's mental condition. As part of appellant's history which he narrated to the jury, Dr. Weatherly stated: "So he returned to the Wilkes-Barre area in January, 1961. He remained occupationally unsuccessful. Essentially, during the sixties, there were no jobs that one might characterize as fulltime, decent jobs." N.T. June 14, 1983 at 1320. In denying appellant's post-verdict motions, the lower court stated:

> The Commonwealth contends that the testimony of the doctor was false and misleading in that it gave the impression that during the 60's Banks [appellant] was making efforts to secure a full time decent job but he was occupationally unsuccessful. As noted in Bank's brief, "the fact of the matter was that [Banks] was incarcerated during the 1960s and defense did not want to bring this fact before the jury." To allow the jury to infer from the testimony that Banks was leading a normal life during this period would have been unfair to the Commonwealth. Allowing the

> Commonwealth to cross-examine as to the facts relied upon by the witness in forming his psychiatric opinion was certainly well within the discretion of the trial Judge. We are satisfied that the trial Court properly permitted the Commonwealth to elicit testimony of Bank's incarceration to rebut the impression that he was leading a normal life during the 60's. Certainly, the testimony was not elicited in any attempt to establish Banks' predisposition to commit the crimes charged or to impugn his character.

Slip op. at 10-11. The court instructed the jury at the time that this evidence was to be considered only for the "very limited purpose; that is, for the purpose of assisting you in determining the mental state of the defendant . . . on September 25, 1982 . . . ." and cautioned the jury that it was not to infer guilt in the instant case because of his prior record. N.T. June 14, 1983 at 1380. Similar instructions were repeated during the court's charge to the jury. N.T. June 21, 1983 at 2196. Under these circumstances, we agree with the lower court that the cross-examination of Dr. Weatherly concerning appellant's prior criminal record and incarceration was admissible for the limited purpose of assisting the jury in assessing the witness' credibility on a crucial and hotly contested issue.

The Commonwealth also elicited rebuttal testimony from the Director of the Domestic Violence Service Center regarding Regina Clemens, who had received shelter at the Center from September 4-7, 1982. The director testified that Ms. Clemens intended to reside with her brother when she left the Center, which contradicted appellant's own testimony that Ms. Clemens intended to return and live with him. This testimony was of essential evidentiary value to the Commonwealth in establishing appellant's

apparent motive for his rampage on September 15, 1982 and that he had the specific intent to kill. Thus, the court did not err in admitting this testimony even though, as appellant suggests, it contained the implication that Regina Clemens was a prior victim of appellant's violence which caused her to seek help at the shelter.

Similarly, the court did not err in allowing a neighbor to testify in its case-in-chief that he observed appellant slapping Susan Yuhas in the week preceding the murders and overheard him state "You're just like your sister Gina. You're going to leave just like her." This testimony supported the Commonwealth's motive theory, and the court did not err in allowing it to be introduced.[14]

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[14] In its opinion denying appellant's post-verdict motions, the court stated:

> We are satisfied that the testimony in question was relevant to the question of motive. It was one of a number of incidents indicating or establishing Banks' desire to secure and/or retain control over his family and his apparent lack of ability to do so. We reject Banks' contention that the claim of motive was conjectural and frail and failed to connect Banks' prior outburst of violent anger against Yuhas to the subsequent killings involved in this case. Such arguments go to the weight of the evidence and not to its admissibility. One cannot always expect to find logical or rational connections between incidents. Why someone would kill 13 people is not easily explained and where evidence, such as this, may well shed light on the reason or purpose and is so closely connected in time, it should not be rejected merely because of some potential prejudice to the Defendant. Considering the nature of the accusations in this case and the facts and circumstances presented, any weighing of the admission of this testimony on the scales of justice falls heavily on the side of the Commonwealth. Accordingly, we find no abuse of discretion in its admission. Slip op. at 9.

Appellant also asserts that the court erred in refusing his request for a mistrial when Detective William Maguire testified that appellant had stated to him he had "some dealings" with the Wilkes-Barre Police Department in the past.[15] N.T. June 9, 1983 at 775. This assertion is without merit. Detective Maguire's passing reference to "some dealings" that appellant may have had with the Wilkes-Barre police in the past did not necessarily or by reasonable implication infer that he had a prior criminal record with that police department, particularly given appellant's occupation as a prison guard at the state correctional institution at Camp Hill. *See Commonwealth v. Carpenter,* 511 Pa. 429, 515 A.2d 531 at 534-35 (1986) and cases cited therein.

Appellant challenges his twelve sentences of death imposed by the jury on several grounds.[16] Our standard of review of a judgment of sentence of death is established by the Sentencing Code, 42 Pa.C.S.A. § 9711(h), which provides:

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[15] Detective Maguire testified as to appellant's arrest and statements appellant had made at the police station. In the course of his direct testimony, he stated: "He made statements concerning the Wilkes-Barre Police. He said he thought the Wilkes-Barre Police was a nice police department; they weren't racists. He had some dealings with them in the past and . . . ." Defense counsel moved for a mistrial, which was denied. N.T. June 9, 1983 at 775.

[16] Appellant's final contention of trial error is that the court erred in denying his petition for exhumation of the victims' corpses. There is no merit to appellant's contention as the court acted well within its discretion in denying this petition. *See Commonwealth v. Kivlin,* 267 Pa.Super. 270, 406 A.2d 799 (1979), *allocatur denied* January 30, 1980.

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

The evidence overwhelmingly supports the finding of an aggravating circumstance, since appellant was convicted on twelve counts of murder of the first degree committed at the time of the offenses in issue, each of which carried a sentence of either death or life imprisonment. 42 Pa.C.S.A. § 9711(d)(10). Appellant maintains, however, that the jury's sentencing verdict was against the weight of the evidence and abused its discretion in failing to give "due consideration" to the mitigating circumstances presented. This contention is patently without merit. "Under our legislative scheme, it is exclusively a jury question whether any mitigating factor is to be given determinitive weight when balanced with other mitigating

and aggravating circumstances . . . ." *Commonwealth v. Fahy,* 512 Pa. 298, 317, 516 A.2d 689 (1986). The jury performed its exclusive function and acted well within the authority placed upon it by the legislature in determining that the overwhelming evidence regarding the aggravating circumstance before it outweighed the mitigating circumstances it found.

Appellant asserts that the prosecutor made improper remarks during closing arguments at the sentencing phase which require that we vacate the sentences of death and remand for the imposition of life sentences. These remarks were: an incorrect suggestion that the *M'Naghten* standard was applicable in determining appellant's mental illness as a mitigating circumstance, which suggestion was objected to and corrected by the trial court; and a remark, made in response to closing remarks of defense counsel, that appellant "did it by showing no sympathy or mercy to his victims, and I ask that you show him no sympathy, that you show him no mercy." N.T. June 21, 1983 at 2311. The latter remark was also objected to, with the objection sustained by the trial court. The prosecutor's misstatement regarding appellant's mental condition and emotional state in consideration of mitigating circumstances was promptly corrected and the jury was accurately charged by the trial court, and appellant was not prejudiced thereby. The prosecutor's remarks regarding no mercy or sympathy were within the oratorical license and impassioned argument that this Court has consistently allowed during the sentencing phase, particularly where prompted by remarks of defense counsel. *See Commonwealth v. Whitney,* 511 Pa. 232, 512 A.2d 1152 (1986), and cases cited therein. Accordingly, we find no basis in the prosecutor's closing arguments for disturbing the jury's

sentences of death, nor do we find those sentences to have been otherwise "the product of passion, prejudice or any other arbitrary factor."

The final argument advanced by appellant is that the death penalty constitutes cruel and unusual punishment in this case "as it befalls upon an individual, who, at the time of commission of the crime, was severely mentally ill." Brief for Appellant at 56. We do not agree. Sufficient evidence of record established that appellant was legally sane when he committed the mass slayings and competent to stand trial, and we see no reason why the jury's finding that he had acted under extreme mental or emotional disturbance would render imposition of the death penalty cruel and unusual punishment. This Court recently addressed a similar argument in *Commonwealth v. Fahy, supra,* 512 Pa. at 316-317, 516 A.2d 689, wherein we stated:

> After oral argument, permission was given and supplemental briefs were filed by both parties concerning an inquiry made by this Court during oral argument. The issue underlying this inquiry is whether a finding by the jury in mitigation under 42 Pa.C.S. § 9711(e)(3) – substantial impairment – precludes imposition of the death penalty, notwithstanding the jury's determination that the three aggravating circumstances present outweighed the two factors found in mitigation. We conclude that it does not.
>
> Our review of the death penalty statute, the record and the nature of the common law bar to execution of the death warrant where the condemned prisoner becomes incompetent after conviction convinces us that a jury finding of substantial mental impairment under § 9711(e)(3)

> does not bar the death penalty imposed by the jury, and that the common law rule has no application here since Appellant is not incompetent.
>
> Appellant was ruled competent to stand trial and for sentencing, and there is nothing in the record to suggest that Appellant is incompetent and should not be executed . . . . Under our legislative scheme, it is exclusively a jury question whether any mitigating factor is to be given determinative weight when balanced with other mitigating and aggravating circumstances in the case. Our legislature could have provided that a finding of substantial impairment precludes imposition of the death sentence, however, it did not do so. Instead, it determined that this factor was to be weighed by the jury along with all the other factors and that it is within the province of the jury to determine how much weight it should be accorded. We find no basis upon which to disturb the verdict and sentence of the jury.

Lastly, we are required to review the penalties imposed in "similar cases" to determine whether the sentence of death is excessive or disproportionate to those imposed in such similar cases. Frankly, we have found no "similar cases" to this, a multiple homicide where appellant coldly massacered thirteen people, including the women and children of his extended family. Nevertheless, we have reviewed other cases wherein the jury has found the same aggravating circumstance found by the jury in the instant

case, and find no excessiveness or disproportionality to the sentences imposed in such other cases.[17]

For the foregoing reasons, we affirm the appellant's convictions and his judgments of sentence.[18]

McDERMOTT, J., concurs in the result.

NIX, C.J., filed a dissenting opinion in which ZAPPALA, J., joined.

NIX, Chief Justice, dissenting.

Although I have serious problems with the trial court's determination that the appellant had the mental competence to stand trial, my dissent from the majority opinion is based on another ground. In my view the trial court, by allowing appellant to put before the jury the gruesome photographs of the infant victims' bullet-torn bodies, permitted him to convert the system of criminal justice into an instrument for his self-destruction.

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[17] We have reviewed the data and information pertaining to similar cases that has been compiled by the Administrative Office of Pennsylvania Courts pursuant to this Court's directive in *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700, 707-08 (1984), *cert. denied* 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984).

[18] The prothonotary of the Eastern District is hereby directed to transmit a full and complete copy of all of the records and transcripts of the trial, sentencing and appeal of this case to the Governor, as required by 42 Pa.C.S.A. § 9711(i). Transmittal of this record to the Governor does not, however, "remove the case from the jurisdiction of the courts or prevent further action by the courts." *Commonwealth v. Travaglia*, 502 Pa. 474, 505-06 n. 5, 467 A.2d 288 (1983), *cert. denied*, 467 U.S. 1256, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984).

The appellant's court-appointed lawyers had advised him not to take the witness stand; yet, he elected to disregard their advice. Although the appellant had every right to give testimony in his own behalf, he went beyond that. The appellant took it upon himself to introduce in evidence, for the purpose of trying to establish a preposterous theory of a conspiracy against him, photographs of the dead victims. Those pictures were so horrible and evocative, so inflammatory in their nature, that the trial court had previously ruled them inadmissible. The judgment as to which exhibits will be introduced into evidence is a function to be performed by a competent trial counsel. *See Commonwealth v. Bell*, 442 Pa. 566, 276 A.2d 834 (1971). The conclusion is therefore inescapable that when the appellant on his own, over the strenuous opposition of his counsel, put the photographs before the jury, he was acting as his own attorney and was representing himself. He had, at that point, superseded appointed trial counsel as to the stewardship of the case.

It is true that the United States Supreme Court, in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), held that a criminal defendant has a constitutional right to represent himself. The Court, however, cautioned that, "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that *'he knows what he was doing* and his choice is made with eyes open.'" *Id.* at 835, 95 S.Ct. at 2541 (emphasis added). The Court also observed that a defendant's right to act as his own lawyer was not a license to abuse

the dignity of the judicial process. *Id.* at 834 n. 46, 95 S.Ct. at 2541 n. 46.

The record in the instant case clearly portrays the appellant as a person suffering from a severe mental disorder, if not at the time of the crime itself, then certainly during the trial. The truth of that conclusion is made even more compelling by the absurdity of his conspiracy theory and his proposal to establish it with exhibits which could do nothing but prejudice his case. Despite the trial court's finding that the appellant was competent to stand trial, his paranoiac utterances and ramblings before the judge should have left no doubt in the mind of the court as to his inability to undertake any part of his representation.[1]

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[1] Prior to appellant's taking the witness stand and introducing the photographs, a colloquy took place between him and the trial judge. During that exchange the appellant made remarks such as: "I can show that there is a conspiracy against me. I can prove it with material fact, right here in this courtroom today . . . . This is the only shot I got to pull the mask off the face of the Devil, and I intend to do it . . . . I sat up here, sir, for eight days and listened to nothing but hypocrisy, lies and corruption and coerced and perjured testimony. I don't see where I can hurt myself . . . . I don't have a chance anywhere in this nation . . . this trial is a farce . . . . I've been bullied enough." Following the last remark, the trial judge stated that he would not tolerate "testimony" of that kind. T.T. 1639-1642.

In response to the court's rebuke the appellant replied: "Well, then, I'll take my best shot and go with what I got. Can I get *my* photographs and stuff?" The judge answered, "you certainly may." T.T. 1642. At that point, defense counsel asked the court to determine again the appellant's mental competency, stressing the utter absurdity of the conspiracy theory. The trial judge denied the motion, and in doing so said: "It *may well be that he believes that. It may well be, as they say, part of his delusion.* If that is so, it doesn't seem to me *you're* hurt." T.T. 1643. This

(Continued on following page)

Other jurisdictions have considered the issue of the power or even the duty of a trial judge to prevent a criminal defendant from representing himself in certain circumstances. For example, in *People v. Burson,* 11 Ill.2d 360, 143 N.E.2d 239 (1957), the Supreme Court of Illinois was confronted with the problem of self-representation by a defendant whose sanity was seriously in doubt. The Court concluded that even if the defendant was sane at the time of trial, his right to represent himself was subject to the constant duty of the court to protect the judicial process from inadequate and improper conduct of the defense. The Court further held that such a duty included the broad discretion to supersede the defendant's conduct of his own defense.

Along similar lines was the thinking of the Supreme Court of Washington in the case of *State v. Kolocotronis,* 73 Wash.2d 92, 436 P.2d 774 (1968). There, that Court stated the following: "Even though a defendant demands his constitutional right to act as his own counsel, if the court determines that he does not have . . . adequate mental competency to act as his own counsel, then his right to a fair trial and his constitutional right to due process of law, [are] disregarded if the court permits him to so act in a criminal case." *Id.* at 97-100, 436 P.2d at 779-80.

As I read the record in this case the trial court, in allowing the appellant to introduce the photographic exhibits, gave no consideration to his questionable mental state at the time. Even assuming the validity of the initial

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last statement addressed the concern of defense counsel that the conspiracy theory would make *them* "look like a bunch of monkeys."

judgment of the court that appellant was competent to stand trial, that judgment did not relieve the court of the responsibility of assuring that the proceedings were in accordance with a fair trial. Moreover, the United States Supreme Court in *Westbrook v. Arizona,* 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966), in a unanimous per curiam opinion stated:

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused – whose life or liberty is at stake – is without counsel. This *protecting duty* imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' *Johnson v. Zerbst,* 304 US 458, 465 [58 S.Ct. 1019, 1023, 82 L.Ed. 1461]; *Carnley v. Cochran,* 369 US 506 [82 S.Ct. 884, 8 L.Ed.2d 70].

Id. at 150, 86 S.Ct. at 1320 (emphasis added).

Although counsel for the defense were physically present, the court permitted Banks to waive the assistance of counsel when appellant was permitted to introduce this evidence and to make these highly prejudicial comments over the strenuous objection of both defense counsel. Such an action in my judgment constitutes a waiver of counsel without the court's exercising its "protecting duty."

For the reasons set forth herein, I am constrained to conclude that the trial judge, in allowing the defendant to introduce the prejudicially inflammatory pictures, did not perform his constitutional protecting duty of attempting to ensure that the waiver of counsel was intelligently and knowingly made. As a consequence, this record reflects that a mockery was made of justice.

This action is justified by the Commonwealth by suggesting that this bizarre conduct was merely a strategem by Banks to convince the jury he was insane. It is quite true that one can feign insanity by acting in a bizarre manner. However, it is equally true that one mentally disturbed is quite likely to act in a bizarre manner. The court should have sought expert medical assistance in determining in this instance which was the case. Such a request was made by defense counsel and refused by the court.

As former Chief Justice Burger observed in his dissenting opinion in *Faretta v. California,* the trial judge is "charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." 422 U.S. at 839, 95 S.Ct. at 2543. That goal, according to Chief Justice Burger, "is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel." *Id.* Going further, Chief Justice Burger said, "[t]he damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the 'freedom to go to jail under his own banner.'" *Id.*

I therefore dissent and would vacate the judgments of sentence.

ZAPPALA, J., joins this dissenting opinion.

[Appendix Omitted]

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656 A.2d 467

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,
v.
George BANKS, Appellant.

Submitted Nov. 1, 1994.
Decided March 27, 1995.

Albert J. Flora, Wilkes-Barre, for Banks.

Peter Paul Olszewski, Scott C. Gartley, Wilkes-Barre, Robert A. Graci, Chief Deputy Atty. Gen., for Com.

Before NIX, C.J., and FLAHERTY, ZAPPALA, CAPPY, CASTILLE and MONTEMURO, JJ.

OPINION

CAPPY, Justice.

This is a direct appeal from an Order of the trial court denying post-conviction relief in a death penalty case.[1] For the following reasons, we affirm the Order of the trial court.

On June 22, 1983, Appellant, George Banks, was convicted by a jury of twelve counts of murder of the first degree. He was also convicted of one count of murder of the third degree, attempted murder, aggravated assault, recklessly endangering another person, robbery and theft

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[1] 42 Pa.C.S. § 9546(d) provides that a final order disposing of a defendant's post-conviction petition shall be directly appealable to this Court in a death penalty case. *See also,* 42 Pa.C.S. § 722.

of a motor vehicle.[2] Following a penalty hearing, appellant was sentenced to death on each of the twelve counts of first degree murder.[3] On direct appeal, this Court affirmed the convictions and judgments of sentence. *Commonwealth v. Banks,* 513 Pa. 318, 521 A.2d 1 (1987), *cert. denied*, 484 U.S. 873, 108 S.Ct. 211, 98 L.Ed.2d 162 (1987). In February, 1989, appellant filed the instant petition for post-conviction relief. The trial court denied that collateral relief petition on September 8, 1993.[4]

To be eligible for PCRA relief, Appellant must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in section 9543(a)(2) and that his issues have not been previously

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[2] During the early morning of September 25, 1982, Appellant shot fourteen (14) people with a Colt AR-15 semi-automatic rifle, killing thirteen (13) and wounding one. The entire rampage lasted no more than one hour. The majority of the victims were women with whom appellant had been involved as well as the children borne of those relationships. A more detailed account of the facts surrounding appellant's convictions is set forth in this Court's decision on direct appeal from the judgments of sentence of death. *See Commonwealth v. Banks,* 513 Pa. 318, 521 A.2d 1 (1987).

[3] In addition to the twelve sentences of death, Appellant was sentenced to consecutive terms of ten to twenty years for the third degree murder conviction, five to ten years for the attempted murder conviction and ten to twenty for the robbery conviction.

[4] Although Appellant purportedly filed his petition under the Post Conviction Hearing Act ("PCHA"), we note that the same was filed after the effective date of the new Post Conviction Relief Act ("PCRA"). As such, Appellant's collateral relief petition must be reviewed under the standards set forth in the PCRA and not those of PCHA. 42 Pa.C.S. § 9542.

litigated.[5] An issue is deemed finally litigated for purposes of the PCRA if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(2). If

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[5] Section 9543 of the PCRA provides, in pertinent part:

(a) General rule. – To be eligible for relief under this subchapter, a person must plead and prove by a preponderance of the evidence all of the following:

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

(iv) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) A violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

the allegations of error have not been finally litigated, Appellant must also demonstrate that those allegations of error have not been waived or that, if waived, either the conditions listed in section 9543(a)(3)(ii) or (iii) are met.[6] 42 Pa.C.S. § 9543(a)(3). An issue is deemed waived "if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, [or] on appeal . . . " 42 Pa.C.S. § 9544(b). Finally, Appellant must demonstrate that the failure to litigate the issue prior to, or during trial, or on direct appeal could not have resulted from any reasonable tactical decision of counsel. 42 Pa.C.S. § 9543(a)(4).[7]

Appellant first contends that the jury instructions, jury poll and the verdict slip employed during the penalty phase suggested to the jury that its findings as to

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[6] Section 9543(a)(3) provides:

That the allegation of error has not been previously litigated and one of the following applies:

(i) The allegation of error has not been waived;

(ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

(iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.

[7] The Commonwealth contends that all of the issues raised in Appellant's post-conviction petition are waived for failure to raise those issues on direct appeal. While we agree that some of the issues presented could have been raised on direct appeal and thus, could be deemed waived under the PCRA, we will nevertheless address all of Appellant's claims since the trial court addressed all of those claims and since it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver. *Commonwealth v. DeHart,* 539 Pa. 5, 650 A.2d 38 (1994).

mitigating circumstances must be unanimous and as such violated the United States Supreme Court's mandate in *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Appellant argues further that in order to comply with *Mills,* a trial court should be required to specifically instruct the jury that unanimity is not required as to findings of mitigating circumstances. Both of these contentions are without merit.

In *Mills,* the United States Supreme Court vacated the sentence of death and remanded for further proceedings, finding that the jury instructions and the verdict slip employed during the penalty phase of Mills' trial created a substantial risk that the jurors would be misled to believe that unless each of them agreed as to the existence of a particular mitigating circumstance, that mitigating circumstance could not be considered in rendering its sentence. In so holding, the Court in *Mills* emphasized that the sentencer must be permitted to consider all mitigating evidence. *Id.* at 384, 108 S.Ct. at 1870, 100 L.Ed.2d at 400. Neither the jury instructions, the jury poll nor the verdict slips in the instant matter contained language which would violate the dictates of *Mills.*

During the penalty phase of the trial, the trial court instructed the jury as follows:

> The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which

outweigh any mitigating circumstance or circumstances.

The verdict must be a sentence of life imprisonment in all other cases.

(N.T. June 20, 1983, Vol. VI, p. 2315). This instruction, which mirrors the language found in the death penalty statute of our Sentencing Code, has previously been reviewed by this Court and determined not to violate *Mills. Commonwealth v. Hackett,* 534 Pa. 210, 627 A.2d 719 (1993); *Commonwealth v. Marshall,* 534 Pa. 488, 633 A.2d 1100 (1993); *Commonwealth v. O'Shea,* 523 Pa. 384, 567 A.2d 1023 (1989), *cert. denied,* 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 180 (1990). Accordingly, appellant's claim with respect to the instruction is without merit.

Similarly, Appellant's claim with respect to the verdict slips is also without merit. The form of verdict slip employed in the instant matter was virtually identical to that considered by this Court in *Commonwealth v. Frey,* 520 Pa. 338, 554 A.2d 27 (1989), *cert. denied,* 494 U.S. 1038, 110 S.Ct. 1500, 108 L.Ed.2d 635 (1990), and determined not to infer to the jury a requirement of unanimity with respect to mitigating circumstances. As such, Appellant's claim that the verdict slip form submitted to the jury in the instant matter impermissibly suggested to the jury that it must find mitigating circumstances by unanimous vote is unfounded.

Nor do the answers provided by the individual jurors during the poll suggest in any manner that they believed unanimity was required in finding mitigating circumstances. In response to defense counsel's request for a jury poll, the trial court in the instant matter stated as follows:

Ladies and gentlemen, counsel has asked for a poll. You will recall that simply means you will be called upon to rise and respond whether your verdict was, in each of the twelve cases, life or death.

The Foreman has indicated, as has been publicly read, that the decision of death was based upon your finding one or more aggravating circumstances which outweighs any mitigating circumstance. He further indicated that the aggravating circumstance was No. 3; the mitigating circumstance was No. 1.

I will call upon each of you individually. I will ask you to rise and indicate whether your verdict in each case, what it was, and whether or not you agreed with the statement made by the Foreman that you found one aggravating circumstance as noted, one mitigating circumstance as noted, and that the aggravating circumstance outweighed the mitigating.

(N.T. p. 2332). The trial court then asked Juror No. 1 what her verdict was with respect to the first of the twelve death penalty convictions to which she responded "Death." In response to the court's further questions, Juror No. 1 responded that her verdict was based on her finding of one or more aggravating circumstances that outweighed any mitigating circumstances; that the aggravating circumstance found by her was "No. 3," (referring to the sequential order of those circumstances as listed on the actual verdict slips); and that she found mitigating circumstance

"No. 1."[8] The trial court then proceeded to ask Juror No. 1 what her sentence was with respect to each of the remaining eleven death penalty cases to which she responded "death" and whether her sentence of death thereon was based upon the same criteria as the first matter to which she responded in the affirmative. The trial court then polled the remaining jurors, asking each of them whether their sentence of death was based on the same criteria. It appears to be Appellant's contention that since the jurors were not specifically polled on each mitigating circumstance presented but not checked on the verdict slip, an inference may be drawn that the jurors were impermissibly prohibited from considering all relevant mitigating factors. We do not agree. Appellant cites this Court's decision in *Commonwealth v. Young,* 524 Pa. 373, 572 A.2d 1217 (1990), in support of his position. *Young*, however, is distinguishable.

In *Young*, the verdict sheet contained explicit instructions that the mitigating circumstances be unanimously found and, upon questioning from the trial court, the foreman therein stated that the jury had "unanimously" found two particular mitigating circumstances but had not come to any conclusion with respect to a third mitigating

[8] The particular aggravating circumstance was 42 Pa.C.S. § 9711(d)(10), the defendant has been convicted of another Federal or State offense committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. The particular mitigating circumstance referred to by Juror No. 1 was 42 Pa.C.S. § 9711(e)(2), the defendant was under the influence of extreme mental or emotional disturbance.

circumstance. This Court there held that although a proper jury instruction had been given by the trial judge, the incorrect verdict sheet together with the jury foreman's response demanded that the matter be remanded for resentencing since it could not be determined whether the jury disregarded the proper instructions as a result of the improper verdict sheet. In the instant matter, the jury was never provided with either an incorrect instruction or incorrect verdict slip. As discussed above, both the verbal instructions given by the court as well as the instructions printed on the verdict slips were correct and not impermissibly suggestive of a unanimity requirement with respect to mitigating circumstances. Nor is there anything in the trial court's questions nor the jurors' responses during the polling that would indicate that they believed they had to find mitigating circumstances unanimously. In sum, neither the instructions of the court nor the printed instructions on the verdict slips nor the questions and responses of the court and jury during polling, standing alone or viewed in total, infer a requirement of unanimity which would violate the dictates of *Mills*.

Moreover, we do not agree with Appellant that a specific charge explicitly informing the jury that it need not find mitigating circumstances by unanimous vote is required. Our decision in *Commonwealth v. Hackett, supra,* 534 Pa. 210, 627 A.2d 719, *makes clear that so long as proper instructions are given by the trial court, there is no requirement that the court specifically charge the jury*

that it need not be unanimous in finding mitigating circumstances. Hackett, *534 Pa. at 222-223, 627 A.2d at 725.*[9]

Accordingly, for all these reasons, Appellant's claim that his sentencing procedures violated *Mills* was properly denied by the PCRA court.

Appellant next contends that the sentencing procedures in effect at the time of his sentencing were ambiguous and not uniformly applied in Pennsylvania, and thus violative of the Eighth and Fourteenth Amendments of the United States Constitution. Appellant premises his argument on a report of the Pennsylvania Criminal Procedural Rules Committee which allegedly delineated several procedural flaws with respect to the death penalty together with the fact that subsequent to his sentencing, Rule 358A of the Pennsylvania Rules of Criminal Procedure was adopted. Appellant seems to contend that the adoption of Rule 358A, although occurring after the imposition of his sentences, somehow evinces that the procedures in place at the time he was sentenced were constitutionally deficient.[10]

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[9] Appellant seems to imply that the adoption of Pa.R.Crim.P. 358A, which became effective July 1, 1989, evinces the impropriety of not specifically instructing the jury on the issue of unanimity as to mitigating circumstances. As this Court recently noted in *Commonwealth v. Tilley*, 528 Pa. 125, 143 n. 11, 595 A.2d 575, 583 n. 11 (1991), the purpose of Rule 358A is simply to provide statewide uniform sentencing verdict slips in death penalty cases and in no way suggests that the prior procedures employed in Pennsylvania were improper.

[10] Appellant contends that the PCRA court failed to address this issue thereby hampering our appellate review of the issue. The Commonwealth submits, however, that the issue was addressed by the PCRA court exactly in the manner in which Appellant raised and

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While Appellant sets forth five specific alleged deficiencies, he fails to argue that any one or more of those alleged deficiencies actually occurred in his case. Instead, he seems to simply be arguing that because the Criminal Procedure Rules Committee believed these issues to be worthy of concern, then *any* death penalty sentence imposed prior to the amendments in 1989 is not constitutionally sound. This argument is ludicrous. Section 9543(a)(2) of the PCRA clearly provides that in order to obtain post-conviction relief, a defendant is required to plead and prove that his conviction or sentence resulted from one or more of the errors or defects enumerated in the Act. Clearly, Appellant has not met this burden. Moreover, as noted in footnote 6, *supra*, this Court in *Commonwealth v. Tilley* noted that the adoption of Rule 358A of the Rules of Criminal Procedure does not suggest the procedure employed prior thereto was constitutionally deficient. Finally, the fact that the Rules Committee may have determined that supplemental rules needed to be implemented, does not, alone, establish that the prior rules and procedures were unconstitutional. Accordingly, Appellant was properly denied post-conviction relief on this issue.

Appellant next contends that he was denied due process of the law by the trial court's alleged failure to

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briefed the same below. In pertinent part, the court below concluded that the adoption of Rule 358A did not render the procedures employed prior thereto improper. Even assuming the court did not address Appellant's precise argument, our review thereof is not affected insofar as his claim relates solely to an issue of law and not one dependent upon missing facts as Appellant seems to suggest.

follow Pa. R.Crim.P. 1507 and 1508.[11] More specifically, Appellant argues that the trial court never gave the

[11] Rule 1507 provides:

(a) The judge shall promptly review the motion, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the motion and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 10 days of the date of the notice. The judge thereafter shall either order the motion dismissed, or grant leave to file an amended motion, or direct that the proceedings continue.

(b) A motion for post-conviction collateral relief may be granted without a hearing when the motion and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(c) The judge may dispose of only part of a motion without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(d) When the motion is dismissed without a hearing, the judge:

(1) shall issue an order to that effect and shall state in the order the grounds on which the case was determined; and

(2) shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken.

Rule 1508 provides:

(a) Except as provided in Rule 1507, the judge shall order a hearing on all material issues of fact raised by the motion and answer, if any. The judge may deny a hearing on a

(Continued on following page)

requisite notice of its intent to dismiss the petition nor did it afford Appellant an opportunity to respond to the court's apparent intent to dismiss. Appellant's contention is, again, unfounded.

The clear intent behind Rules 1507 and 1508 was to assure that an evidentiary hearing be held on a

specific issue of fact when a full and fair evidentiary hearing upon that issue was held at trial or at any proceeding before or after trial. The judge shall schedule the hearing for a time that will afford the parties a reasonable opportunity for investigation and preparation, and shall enter such interim orders as may be necessary in the interests of justice.

(b) The judge, on motion or request, shall postpone or continue a hearing to provide either party a reasonable opportunity, if one did not exist previously, for investigation and preparation regarding any new issue of fact raised in an amended motion or amended answer.

(c) The judge shall permit the defendant to appear in person at the hearing and shall provide the defendant an opportunity to have counsel.

(d) Upon the conclusion of the hearing the judge shall:

(1) determine all material issues raised by the motion, if any;

(2) issue an order denying relief or granting a specific form of relief and stating the grounds on which the case was determined, and issue any supplementary orders appropriate to the proper disposition of the case; and

(3) state on the record, or issue and serve upon the parties, findings of fact and conclusions of law on all material issues.

(e) If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken. If the case is taken under advisement, the judge shall advise the defendant of the right to appeal by certified mail, return receipt requested.

post-conviction petition where there are factual issues to be resolved. Where, however, the issues raised in a petition involve no disputed factual issues, a hearing thereon is clearly not necessary and a resolution thereof without such a hearing does not violate the rules. Further, under Rule 1507(a), notice of a court's intention to dismiss is required only where the trial court, after review of the petition, any answer by the Commonwealth thereto, and any other matters of record, determines that a hearing is not necessary, that the petitioner is not entitled to post-conviction relief *and that no further proceedings are necessary.* Unequivocally, the purpose of such notice is to afford the petitioner an opportunity to respond as to why dismissal would be inappropriate. Here, however, the trial court, upon review of the petition and answer thereto, was not required to provide notice as it simply was not its intention to then dismiss the petition. While it is true that the trial court did not hold an evidentiary hearing on this matter, it appears that both Appellant and the Commonwealth agreed that the issues presented involved no factual disputes but only issues of law.[12] Appellant does not dispute that he had notice of the trial court's intention *not* to hold an evidentiary hearing. Surely, had he disagreed with the court's conclusion in this respect, he would have responded in an appropriate manner. Indeed, no where

[12] By Order dated December 4, 1992, the trial court scheduled oral argument on the petition, noting that it found that the petition raised no material issues of fact. It appears from the record that briefs by both Appellant and the Commonwealth had been filed prior to the date of this Order. It also appears, that following the entry of this December 4, 1992 Order, the parties agreed to submit the issues on briefs rather than proceed to oral argument.

does he argue that there are issues of fact that must be determined. In sum, the trial court's manner of disposition of Appellant's Post-Conviction Petition did not violate Rules 1507 and 1508.

Next, Appellant contends that our proportionality review as provided for in 42 Pa.C.S. § 9711(h)(3)(iii) and as conducted pursuant to this Court's decision in *Commonwealth v. Frey,* 504 Pa. 428, 475 A.2d 700 (1984), *cert. denied* 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984), denied him procedural due process under the Fourteenth Amendment to the United States Constitution. It is Appellant's contention that because a defendant is not provided any opportunity to contest the accuracy of the information being gathered by the Administrative Office of Pennsylvania Courts ("AOPC") and relied upon by this Court in carrying out its statutorily mandated proportionality review, he is denied due process. This due process claim is premised upon Appellant's argument that because the proportionality review impacts upon sentencing, it is a critical stage of the criminal proceedings to which due process rights of confrontation and cross-examination attach. Appellant's claim is without merit for several reasons.

First, as the trial court accurately noted, proportionality review is not an adversarial part of the trial or sentencing procedures in a death penalty case. Indeed, it is not even a sentencing proceeding at all. Rather, it is an appellate process designed to assure that a sentence of death imposed in a particular case is not disproportionate to the penalty imposed in similar cases. Moreover, a similar claim has previously been rejected by this Court in *Commonwealth v. DeHart,* 512 Pa. 235, 516 A.2d 656 (1986), *cert. denied,* 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746

(1987), *remanded on other grounds,* 539 Pa. 5, 650 A.2d 38 (1994). There, we stated:

> Appellant next argues that the death penalty statute is defective in that it provides the defense with no funds or administrative assistance to determine if the proportionality review required pursuant to 42 Pa.C.S. § 9711(h)(3)(iii) is adequately performed. Appellant's concern with the manner in which this Court reviews the proportionality of sentences in capital cases is unwarranted. In *Commonwealth v. Frey,* 504 Pa. 428, 475 A.2d 700, *cert. denied*, 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984), we ordered the performance of an ongoing comprehensive study of all cases in which the defendant was convicted of first degree murder since the effective date of the present death penalty statute. For each such case, information has been compiled concerning the age, race and sex of the defendant and the victim, whether the death penalty was sought, the aggravating and mitigating circumstances presented and the evidence relating thereto, the sentence imposed, related charges and the disposition thereof, and data concerning any co-defendants. This study entitled "Pennsylvania Death Penalty Study," is maintained by the Administrative Office of Pennsylvania Courts and is made available by that office free of charge. Thus there is no barrier to access to the information upon which this Court bases its decision as to proportionality. Absent some definitive criticism of the adequacy and/or the accuracy of the information supplied by this source, the instant argument is without merit.

Id. 512 Pa. at 259-260, 516 A.2d at 669. Appellant, similar to the defendant in *DeHart,* has failed to point to

any actual deficiencies and/or inaccuracies in the relevant information supplied by the AOPC. Moreover, Appellant makes no claim that he requested and was denied access to the information compiled by the AOPC or that he was in any manner precluded from conducting his own investigation as to the accuracy of that information. As such, Appellant is not entitled to post-conviction relief as to this issue.

Finally, Appellant contends that the trial court abused its discretion in permitting Appellant to testify and cross-examine certain witnesses and thereby denied Appellant effective assistance of counsel. While somewhat convoluted, the crux of Appellant's argument is that the trial court erred in permitting him to assist in his own defense.

During the guilt phase of trial, counsel for Appellant informed the court that Appellant wished to testify against the advice of counsel. Accordingly, the trial court conducted an extensive colloquy explaining in great detail the rights Appellant would be foregoing if he testified and most importantly, the prejudicial effect his own admission of evidence may have on his case. During the colloquy it was clear that Appellant wished to present his theory of conspiracy[13] and that in so doing he intended to introduce photographs of some of the corpses thereby opening the

[13] As this Court noted in our opinion on direct appeal in this matter, Appellant believed that the police officers, the Mayor of Wilkes-Barre, the District Attorney's office and perhaps the court were conspiring against him by concealing and altering evidence, shooting some of the victims, rearranging some of the corpses and covering up some of their wounds, and obstructing Appellant's attempts to expose the "conspiracy." *See Commonwealth v. Banks,* 513 Pa. at 336, 521 A.2d at 10.

door for the Commonwealth to introduce additional photographs previously deemed to be inadmissible as too prejudicial.[14] The trial court explained to Appellant that it previously ruled similar photographs inadmissible so as to prevent Appellant from being prejudiced thereby and that if Appellant, himself, chose to admit photographs of the victims, he would likely suffer prejudice as a result thereof. Appellant indicated his clear understanding of the trial court's instructions as well as the consequences of his acknowledged strategy. Accordingly, the trial court permitted him to testify. Appellant now contends that the trial court's ruling was in error and that the effect of that ruling was to deprive his counsel of actual control over the proceedings and thus, deny him "his right to effective assistance of counsel." (Brief of Appellant, p. 24). While disguised as a claim of ineffectiveness, we discern no such claim in Appellant's argument.[15] No where does Appellant contend that his trial counsel were ineffective; rather he argues that the trial court, by its ruling, denied him effective assistance of counsel. In essence, what Appellant here argues is that the admission of the gruesome photographs and the cross-examination of witnesses during which Appellant used some of those photographs was so prejudicial that the court should not have permitted same, irrespective of Appellant's unwavering insistence on

[14] During a pre-trial suppression hearing, the trial court ruled that the Commonwealth would not be permitted to introduce photographs of the corpses.

[15] At page 22 of his brief, Appellant complains that the trial court incorrectly addressed a "competency" claim rather than an ineffective assistance of counsel claim.

admitting those photographs and cross-examining those witnesses.

The issue of the admission of the photographs was raised by Appellant on direct appeal and addressed by this Court in its prior opinion in this matter. *Commonwealth v. Banks,* 513 Pa. at 348-349, 521 A.2d at 16-17. As such, that issue has been finally litigated and Appellant is not entitled to PCRA relief thereon. 42 Pa.C.S. § 9544(a)(2). However, again, given the serious nature of the matters before us, we will proceed to address Appellant's claim.

The law is clear that a defendant has a constitutional right to present his own defense at trial. *Commonwealth v. Bryant,* 524 Pa. 564, 574 A.2d 590 (1990). A defendant may also be permitted to act as co-counsel even though he has counsel available, but that determination lies within the sound discretion of the trial court. *Commonwealth v. Colson,* 507 Pa. 440, 490 A.2d 811 (1985), *cert. denied,* 476 U.S. 1140, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986). Based upon our review of the record, we are satisfied that the trial court here did not abuse its discretion in permitting appellant to assist in his defense. First, our review of the record reveals that Appellant knowingly and intelligently waived his right against self-incrimination. The record demonstrates that Appellant was fully informed and indicated his understanding of the risks inherent in his participation in his own defense. In addition, this Court previously reviewed the competency determinations of the trial court, including those rendered at the time Appellant chose to testify, and concluded that [the] lower court did not err in finding Appellant competent. *Commonwealth v. Banks,* 513 Pa. at 336-344, 521 A.2d at 10-14. Appellant's final claim was, thus, properly denied by the trial court.

For all the foregoing reasons, the order of the Court of Common Pleas of Luzerne County is affirmed.[16]

NIX, C.J., files a concurring opinion.

MONTEMURO, J., is sitting by designation.

NIX, Chief Justice, concurring.

On direct appeal, I dissented on the basis that the trial judge failed to ensure that Banks made a knowing and intelligent waiver of his right to counsel by permitting him to introduce prejudicially inflammatory pictures. I continue to adhere to this view; however, I am constrained to recognize that this issue has been finally litigated and is not subject to collateral attack in its present posture. *See* 42 Pa.C.S. § 9544(a)(2).

[16] The Prothonotary of the Supreme Court is directed to transmit the complete record in this case to the Governor. 42 Pa.C.S. § 9711(i).

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